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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~284~~ 33.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, PLAINTIFF IN ERROR,

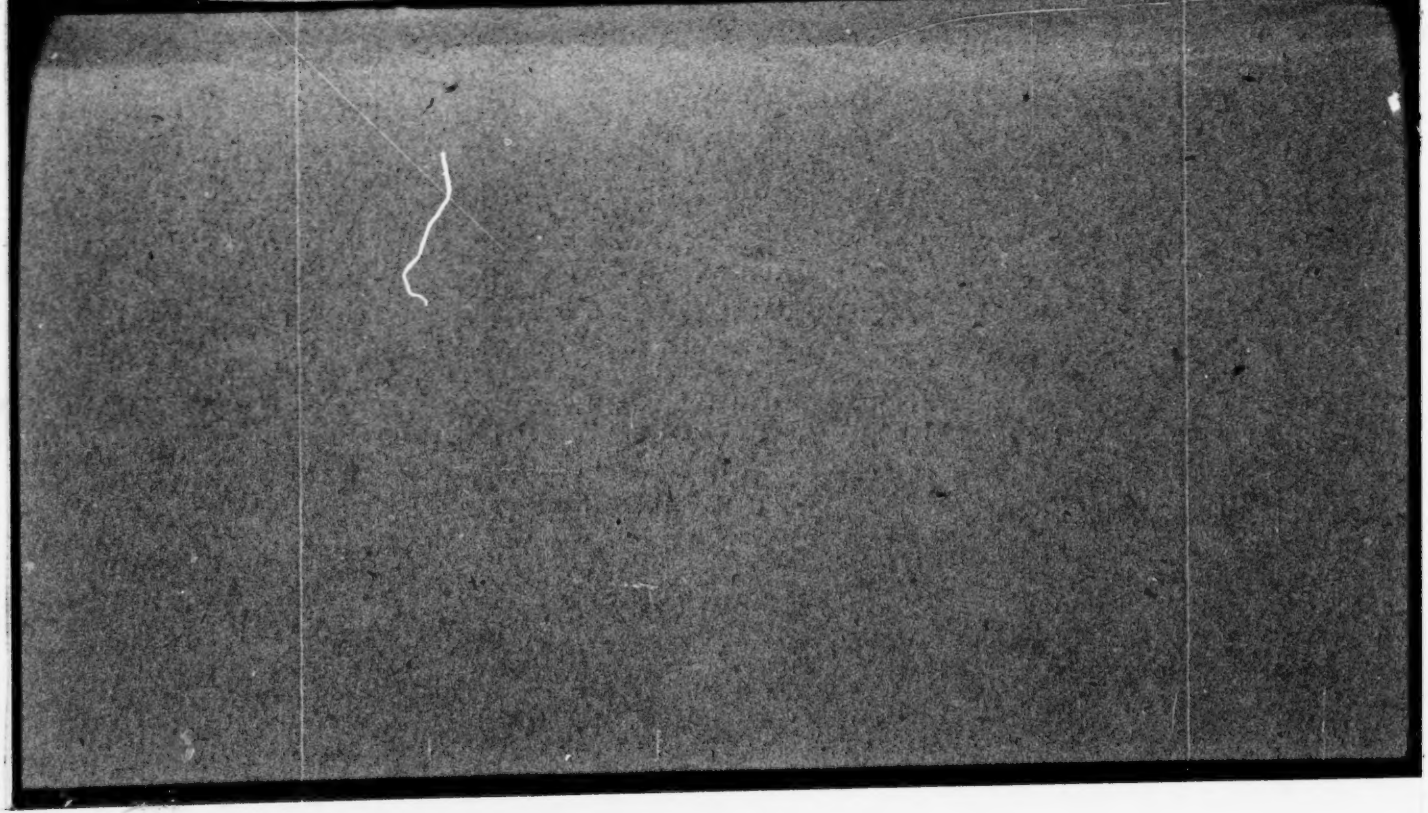
vs.

FIRST NATIONAL BANK OF GENESEO, ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED JUNE 5, 1905.

(19,786.)



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6 THE NATIONAL LIVE STOCK BANK OF CHICAGO, Illinois, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant in Error.
} No. 1541.

Appeal to the Supreme Court of the United States from the Territory of Oklahoma.

1 THE UNITED STATES OF AMERICA, Territory of Oklahoma, } ss:

I, the undersigned clerk of the supreme court of the Territory of Oklahoma, do hereby certify that on the 6th day of May, A. D., 1905, there was deposited in the office of the clerk of the supreme court of said Territory a writ of error which original writ is hereto attached next following:

2 THE UNITED STATES OF AMERICA, Territory of Oklahoma, } ss:

The President of the United States of America to the honorable judges and clerk of the supreme court of the Territory of Oklahoma, Greeting:

Because in the record of proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of Oklahoma before you, being the highest court of law and equity of the said Territory in which a decision could be had, in the said suit between The National Live Stock Bank of Chicago, Illinois, a corporation, and The First National Bank of Geneseo, Illinois, a corporation, wherein a judgment was rendered in said cause in favor of the defendant in error and against the plaintiff in error affirming a certain judgment of the district court within and for Woodward county, Oklahoma Territory, and rendering judgment therein in favor of the said defendant in error and against the said plaintiff in error and adjudging that said plaintiff in error take nothing by its said action, all at the cost of the said plaintiff in error, and wherein the value of the property and the amount in controversy between said parties in said cause exclusive of interest and costs, as shown by the affidavit of Earle W. Evans, Esquire, one of the attorneys of the plaintiff in error, exceeded and exceeds the sum of five thousand dollars ($5,000.00), and is of about the sum of fourteen thousand dollars ($14,000.00). A manifest error hath happened to the great damage of said National Live Stock Bank of Chicago, Illinois, as by its complaint and assignment of errors appears. We being willing that error, if any hath been, should be duly corrected

and full and speedy justice done to the parties aforesaid, in this behalf do command you if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same at Washington at the said Supreme Court within thirty days from the date hereof: that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

3 Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 6th day of May, in the year of our Lord one thousand nine hundred and five, in the one hundred and thirtieth year of the Independence of the United States of America.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

The above writ of error is hereby allowed.

JNO. H. BURFORD,
Chief Justice of the Supreme Court
of the Territory of Oklahoma.

4 [Endorsed:] No. 1541. The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in eror. Writ of error. Filed May 6 1905 Benj. F. Hegler, clerk supreme court. By —— ——, deputy.

5 I, Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby return and transmit a full, true and complete transcript of the record and proceedings had in said court in the case of The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error, being the same identical proceeding described in said writ; and I do hereby certify that the pages following numbered one (1) to 258 inclusive contain a full, true and complete transcript of the record and proceedings had in said court in said cause.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed at my office in the city of Guthrie, in the Territory of Oklahoma, this 2nd day of June, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred thirtieth.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Be it remembered: that on the 1st day of June, 1904, there was filed in the office of the clerk of the supreme court of the Territory of Oklahoma a petition in error with a case-made attached; which said petition in error and case-made thereto attached are in words and figures following, to-wit:

6 In the Supreme Court of Oklahoma Territory.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant in Error.

Petition in Error.

The National Live Stock Bank of Chicago, Illinois, the above named plaintiff in error, alleges:

That in an action then and there pending in the district court of Woodward county, Oklahoma Territory, wherein the above named plaintiff in error, The National Live Stock Bank of Chicago, Illinois was plaintiff, and the above named defendant in error, The First National Bank of Geneseo, Illinois, was defendant, the said defendant did, on to wit: the 18th day of April, A. D., 1904, at the April term 1904, of the said district court of Woodward county, Oklahoma Territory, recover a judgment against this plaintiff in error, and judgment was therein rendered in favor of the said above named defendant in error, The First National Bank of Geneseo, Illinois, against this plaintiff in error, The National Live Stock Bank of Chicago, Illinois, in the sum of fourteen thousand, four hundred seventeen and 33/100 dollars, together with the costs of said action, amounting to one hundred sixty-three and 33/100 dollars. That the amount in controversy in said district court, and now in controversy in this court, exceeds exclusive of interest and costs, the sum
7 or value of five thousand dollars. That an original case made, embodying all of the proceedings had upon the trial of said action in which said judgment was rendered as aforesaid, duly prepared, served, allowed, and signed by the judge of the said district court who tried said case and rendered said judgment is hereto attached, marked Exhibit "A" and made a part of this petition in error.

Plaintiff in error alleges that there were material errors committed by the court below in the trial of said action and in the rendering of its decisions and of said judgment hereinbefore mentioned, which said material errors are apparent upon the face of this record and case-made and are as follows:

1. That said district court erred in admitting upon the trial of said action in the court below incompetent and irrelevant evidence

offered in behalf of the defendant in error, defendant below, and over the objections of the plaintiff in error, plaintiff below.

2. That said district court erred upon the trial in the court below in overruling the motion of the plaintiff in error, plaintiff below, to strike out and withdraw from the consideration of said court, incompetent and irrelevant testimony offered and given in behalf of the defendant in error, defendant below.

3. That said district court erred in rejecting and ruling out competent, relevant and material evidence offered on the trial in the court below in behalf of the plaintiff in error, plaintiff below.

4. That said district court erred in the trial in the court below in overruling the motion of the plaintiff in error, plaintiff below, for judgment on the evidence submitted by both parties.

5. That the said district court erred in the trial in the court below in not sustaining the motion of the plaintiff in error, plaintiff below, for judgment on the evidence submitted by both parties.

8 6. That said district court erred in the trial in the court below in overruling the motion of the plaintiff in error, plaintiff below, for a new trial and to set aside the decision and judgment of said district court therein rendered.

7. That said district court erred in the trial in the court below in not sustaining the said motion of the plaintiff in error, plaintiff in the court below, for a new trial and to set aside the decision and judgment of the court therein rendered.

8. That the said district court erred in rendereing the judgment hereinbefore referred to in favor of the defendant in error, defendant below, and against the plaintiff in error, plaintiff below.

9. That the said district court erred in the trial in the court below in holding and deciding that the chattel mortgage set forth in the amended petition of the plaintiff in error, plaintiff below, filed in the court below and introduced in evidence upon the trial in the court below, was second and inferior to the chattel mortgage set forth in the answer of the defendant in error, defendant below, to the amended petition of plaintiff in error, plaintiff below and introduced in evidence in the trial in the court below.

10. That the said district court erred in the trial in the court below in not holding and deciding that the chattel mortgage set forth in the amended petition of the plaintiff in error, plaintiff below, and introduced in evidence on the trial in the court below, was paramount and superior to the chattel mortgage set forth in the answer of the defendant in error, defendant below, to the amended answer of the plaintiff in error, plaintiff below, filed therein.

11. That the said district court erred in the trial in the court below in holding and deciding that the purported release of the chattel mortgage set forth in the answer of the defendant in

9 error to the amended petition of the plaintiff in error, plaintiff below, was insufficient to release the said mortgage so claimed by the defendant in error.

12. That the said district court erred in the trial in the court below in holding and deciding that the instrument purporting to be a release of the chattel mortgage set forth in the answer of the defendant in error to the amended petition of the plaintiff in error was insufficient to release said chattel mortgage as against the claim and mortgage of the plaintiff in error.

13. That the said district court erred in the trial in the court below in holding and deciding that the defendant in error, defendant below, could not and should not have filed for record its assignment for the chattel mortgage set forth in its answer to the amended petition of the plaintiff in error, plaintiff below.

14. That said district court erred in not holding and deciding that the defendant in error, defendant below could and should have filed for record its assignment of the chattel mortgage set forth in its answer to the amended petition of the plaintiff in error, plaintiff below.

Wherefore, plaintiff in error prays that the said judgment and decision of the court below may be reversed and set aside and this plaintiff in error be restored to all of its rights the same as though no such judgment had been rendered.

WINSTON, PAYNE & STRAWN,
GEO. S. GREEN,
STANLEY, VERMILLION & EVANS,
Attorneys for Plaintiff in Error.

Filed Jun- 1, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

10 THE TERRITORY OF OKLAHOMA, Woodward County, } ss:

In the District Court Thereof.

THE NATIONAL LIVE STOCK BANK of Chicago, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF Geneseo, Illinois; Wm. Hixon, and John Parr, Defendants.
} No. 260. Complete Transcript.

Be it remembered that, on the 28th day of May, 1901, there was filed in the district court of Woodward county, in said Territory, a petition in the above entitled action, a correct, full and complete copy of which is in the words and figures following, to wit:

In the District Court of Woodward County, Oklahoma Territory.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS; WM. HIXON, and John Parr, Defendants.

Petition.

For its cause of action against the above named defendants, plaintiff alleges:

That plaintiff is now and for more than two years last past has been a national banking corporation duly chartered, organized and existing under and by virtue of the laws of the United States of America.

That defendant, The First National Bank of Geneseo, Illinois, is now, and for more than two years last past has been a national banking corporation duly chartered, organized and existing under and by virtue of the laws of the United States of America.

That on to wit: the 17th day of April, A. D., 1901, one W. B. Grimes Jr., duly executed and delivered unto the Seigel-Sanders Live Stock Commission Company, a corporation duly
11 chartered, organized and existing under and by virtue of the laws of the State of Missouri, his two certain promissory notes in writing of that date, by the terms of each of which on the 27th day of October A. D., 1901, he promised to pay to the order of said Seigel-Sanders Live Stock Commission Company the sum of seventy-six hundred ninety-four and 77/100 dollars, with interest at the rate of seven per cent. per annum until paid.

That at the time of the execution and delivery of said promissory notes as aforesaid, the said W. B. Grimes, Jr., for the purpose of securing the payment of the same, duly executed and delivered unto the said Seigel-Sanders Live Stock Commission Company his one certain chattel mortgage or conveyance, dated April 17th, 1901, whereby and by the terms of which he did convey unto the said Seigel-Sanders Live Stock Commission Company six hundred and six head of cattle as follows: One hundred and sixteen head of three year old native steers. Four hundred and ninety head of two year old native steers, all branded thus: – – – on left thigh of left hind leg and commonly known as and called bar brand cattle.

That at the date of the execution and delivery of said notes and said mortgage, and for more than thirty days thereafter, the said W. B. Grimes Jr., was a resident and citizen of Clark county, Kansas, and the cattle above described, and each and every head thereof, were in Clark county Kansas.

That thereafter and on to wit: the 25th day of April, A. D. 1901, at eight o'clock a. m. said chattel mortgage was duly filed for record in the office of the register of deeds of Clark county, Kansas, and

thereafter duly recorded in Book Six at page one hundred and thirty-two.

That after the execution and delivery of said promissory notes as aforesaid and before the maturity thereof, the said Seigel-Sanders Live Stock Commission Company, by R. D. Swain, its duly
12 elected, qualified and acting treasurer, he being then and there duly authorized so to do, duly sold said promissory notes and each of them to this plaintiff, by its written endorsement duly executed on the back of each of said notes.

That true and correct copies of said notes and the endorsements thereon are hereto attached, marked respectively Exhibits A and B and made a part hereof.

That plaintiff is now the owner and holder of said notes above referred to, and each of them, and is now the owner and holder of said mortgage so given to secure the payment of the same as aforesaid.

That by the terms of said chattel mortgage, as will more fully appear by reference to Exhibit "C," it is provided that if default be made in the payment of the sum of money by said mortgage secured, or any part thereof, or any interest thereon, according to the tenor and effect of said indebtedness when the same becomes due and payable or failure to conform to, or comply with any of the conditions and agreements in said mortgage mentioned, then the whole sum of money by said mortgage secured shall, at the option of the legal holder of said notes, become due and payable at once without notice. And it is further provided in said mortgage that in case of sale or disposal, or attempt to sell or dispose of the property so mortgaged, or a removal or an attempt to remove the same from the premises where the same were at the time of their being mortgaged, or any unreasonable depreciation of value, or if for any other cause the security shall become inadequate, or the holder of said notes shall deem itself insecure at any time before said indebtedness is fully paid, whether the same is due or not, then and thenceforward it shall be lawful for the holder of said notes, or their authorized agent, to enter upon the premises of the said mortgagor, or any other place or places where said property aforesaid may be,
13 to remove and dispose of the same without resort to law and without appraisement or notice, (all right to redemption, appraisement and notice of foreclosure required by law being thereby expressly waived,) and all the equity of redemption of the said mortgagor, at public auction or private sale.

Plaintiff alleges that the conditions of said mortgage have been and are broken, and that said cattle have been removed from the premises whereon they were situated at the time of the execution of said mortgage, and have been removed from Clark county, Kansas, and have been disposed of, or an attempt made to sell or dispose of the same; that plaintiff deems itself insecure and has elected and does elect to declare the terms of said mortgage broken, as under and by virtue of the terms of said mortgage it has a right to do.

That said personal property hereinbefore mentioned is now in the possession of the defendants above named, who wrongfully and without right either at law or equity detain and hold the same from the plaintiff.

That on to wit: the 25th day of May, A. D., 1901, the plaintiff made due and legal demand upon the defendants for the surrender to it of the possession of said personal property, but that the said defendants have refused and do refuse to surrender the same, and do continue to hold possession thereof from the plaintiff. That the actual value of said personal property above described is fifteen thousand, three hundred eighty nine and 54/100 dollars.

That by reason of the wrongful detention of said personal property as aforesaid by the said defendants and their withholding the same in the manner aforesaid from the plaintiff, the plaintiff has been damaged in the sum of two thousand dollars.

Wherefore plaintiff prays judgment for the possession of said personal property hereinbefore described, and if the same cannot
14 be had, plaintiff prays judgment for the sum of fifteen thousand, three hundred eighty-nine and 54/100 dollars, the value of said property, with interest from the 25th day of May 1901 at the rate of seven per cent. per annum, and for the further sum of two thousand dollars damages, with interest at the rate of seven per cent. per annum from said date, and for the costs of this suit, and such other and further relief as to the court may seem equitable and just in the premises.

WINSTON & MEAGHER AND
STANLEY, VERMILION & EVANS,
Attorneys for Plaintiff.

15 No. 32294, Due Oct. 28, 1901.

Seigel-Sanders Live Stock Commission Co.

Capital Stock, $250,000.00.

Rooms 73–74–75, Live Stock Exchange.

KANSAS CITY, Mo., April 17th, 1901.

October 27th, 1901, after date I, we or either of us promise to pay to the order of Seigel-Sanders Live Stock Commission Co. at their office, seventy six hundred ninety four & 77/100 dollars, $7,694.77, with interest from maturity at the rate of seven per cent. per annum until paid.

W. B. GRIMES, JR.

No. 1336 Due ——.

Endorsed: For value received we hereby assign this note to the National Live Stock Bank of Chicago or order, and waive demand

notice and protest of same, and guarantee payment thereof at maturity. Seigel-Sanders Live Stock Commission Co. By R. D. Swain, treas.

Exhibit "A"
The mortgage securing this note is duly stamped according to law.

No. 32295, Due Oct. 28, 1901.

Siegel-Sanders Live Stock Commission Co.

Rooms 73–74–75, Live Stock Exchange.

KANSAS CITY, KANS., April 17th, 1901.

October 27th, 1901, after date I, we or either of us, promise to pay to the order of Siegel-Sanders Live Stock Commission Co., at their office, seventy six hundred ninety four and 77/100 dollars, $7,694.77, with interest from maturity at the rate of 7 per cent. per annum until paid. Value received.

W. B. GRIMES, JR.

No. 1335 Due ——.

Endorsed: For value received, we hereby assign this note to the National Live Stock Bank of Chicago, or order, and waive demand, notice and protest of same, and guarantee payment thereof at maturity. The Siegel-Sanders Live Stock Commission Co. By R. D. Swain, treas.

Exhibit "B"
The mortgage securing this note is duly stamped according to law.

16 EXHIBIT "C."

Know all men by these presents, that W. B. Grimes, Jr., of the county of Clark, State of Kansas, party of the first part, in consideration of the sum of fifteen thousand three hundred eighty-nine and 54/100 dollars paid by Siegel-Sanders Live Stock Commission Company, a corporation, party of the second part, the receipt whereof is hereby acknowledged, *have* sold, assigned and delivered, and by these presents does sell, assign and deliver unto said second party all the following articles of personal property situated in the county of Clark and State of Kansas, to wit:

(606) six hundred and six head of cattle as follows:

(116) one hundred sixteen head of three year old native steers,

(490) four hundred ninety head of two year old steers, natives.

All of the above described cattle branded thus and being all the cattle of this brand in his possession, owned or controlled by

him and being the same cattle bought by bill of sale to parties of the second part, and having been fed all during the winter, and are to be grazed during the life of this loan, and now being held in the enclosed pasture, and are not to be moved or sold without notice to and the written consent of said second party.

And being the property of the above description owned or controlled by the mortgagor now on said premises, and this mortgage is intended to cover and include all of said property of the above description and any addition and increase thereto located on the above described premises and range, if any, thereabouts. The marks and brands used above to describe said property are the holding marks and brands and carry the title, although said property may have other marks and brands, if the mortgagor should desire to mix any other property with the above, before doing so he shall
17 give a full description of said property intended to be so mixed with the name of the owner thereof, to said second party, and obtain the written consent of said second party before mixing the same.

This mortgage shall also cover and include all the right, title and interest of the mortgagor in and to the pasturage, feed pens, feed trough and water privileges used in feeding said live stock. Said property to remain and be kept on the premises above described until the full payment of the indebtedness hereinafter described, unless sooner marketed or removed by and with the written consent of the mortgagee or its assigns.

When marketed said cattle are to be shipped and consigned for sale to Siegel-Sanders Live Stock Commission Company at Kansas City stock yards, and when sold the proceeds thereof shall be applied first in payment of the usual customary commissions to said Siegel-Sanders Live Stock Commission Company for selling the same and the balance or so much thereof as may be necessary, shall be applied on the indebtedness hereinafter described. If said cattle or any part thereof be consigned or sold elsewhere than above, then said mortgagee shall be paid a commission of 50 cents per head on all the above described cattle.

Provided always and these presents are upon this express condition that if said party of the first part shall pay or cause to be paid unto the said party of the second part, the aforesaid sum of fifteen thousand three hundred eighty nine 54/100 dollars.

($15,389.54) according to the terms of two certain promissory notes as follows:

One note for $7,694.77 dated April 17th, 1901, payable October 27th, 1901.

One note for $7,694.97, dated April 17th, 1901, payable
18 October 27th, 1901.

All payable at the office of said Siegel-Sanders Live Stock Commission Company, Kansas City, and all with interest thereon at the rate of 7 per cent. per *cent. per* annum from maturity or according to the terms of consent of said second party, its successors or assigns,

and may be *evident* by the execution of a new note or notes in place of said original indebtedness at or after maturity, for the amount of the debt then unpaid and payable hereunder, and for which this mortgage is and shall be a continuing security until paid whether said debt is evidenced by said original indebtedness above described or any renewals or extensions thereof, and which said indebtedness the party of the first part hereby agrees to pay on maturity thereof, then these presents and everything herein contained shall be void, any thing herein contained to the contrary notwithstanding. And it is hereby mutually covenanted and agreed between the parties hereto, that if default be made in the payment of said sum of money, or any part thereof, or the interest thereof, according to the tenor and effect of said indebtedness when the same became due and payable, or upon a failure to conform to or comply *to or comply* with any of the conditions and agreements herein mentioned, then the whole sum of money hereby secured shall at the option of the party of the second part, or the legal holder or holders of said note or notes, become due and payable at once without notice. And it is further agreed that in case of sale or disposal, or attempt to sell or dispose of the goods and chattels hereby mortgaged or a removal of, or attempt to remove the same from the premises aforesaid, or an unreasonable depreciation in value, or if from any other cause the security shall become inadequate or the party of the second part shall deem itself insecure at any time before said indebtedness is fully paid, whether the same be due or not, then and thenceforth it shall be lawful for the said party of the second part, its successors or assigns or its authorized agents, to enter upon the premises of the said party of the first part, or any other place or places wherein said goods and chattels or live stock aforesaid may be, to remove and dispose of the same as aforesaid without resort to law, and without appraisement or notice (all right of redemption, appraisement and notice of foreclosure required by law being hereby expressly waived) and all the equity of redemption of the said party of the first part, at public auction or private sale, to the person or persons who shall pay the highest price for the same, and out of the avails thereof to retain the full amount of said obligation, with the interest thereon, according to the conditions thereof, together with all reasonable costs and expenses attending the same and commissions aforesaid, rendering to said party of the first part, or his legal representatives, the surplus money, if any there be, anything herein to the contrary notwithstanding.

19

And until default be made as aforesaid, or until such time as the said party of the second part shall deem itself insecure, as aforesaid, the said party of the first — to continue in peaceable possession of all said goods and chattels, all of which in consideration thereof he agrees shall be kept in good condition as the same now are, and taken care of at his own proper cost and expense, and upon the neglect or failure of said first party so to do, then said second party,

its successors or assigns, may cause the same to be done and for all expenses so incurred and sums expended, this obligation shall be a continuing security and if from any cause said property shall fail to satisfy said debt and interest aforesaid, said party of the
20 first part hereby agrees to pay the deficiency.

For the purpose of obtaining the money at this time loaned by the second party and the benefit of future transactions, the first party states that the first party is the absolute owner of all the above described property; that the same is free from any incumbrances, and that all the same is now in the possession of said party at the location.

In witness whereof, the party of the first part *have* hereunto set *their* hands and seal this 17th day of April in the year of our Lord, one thousand nine hundred and one.

W. B. GRIMES, JR. [SEAL.]

Signed sealed and delivered in the presence of
M. G. STEVENSON.

21 STATE OF KANSAS, } ss:
County of Clark, }

Be it remembered that on this 19th day of April, A. D. 1901, before me the undersigned, a notary public duly commissioned and acting as such within and for the county of Clark aforesaid, personally came W. B. Grimes, Jr., to me well known to be the grantor described in who executed and whose name is subscribed to the foregoing instrument of writing as a party thereto, and stated and acknowledged to me that he executed the same as his free act and deed for the purpose and considerations therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in Ashland in said county the day and year first above written. My term of office as notary public will expire October 5th, 1903.

Revenue stamp 7.25 cancelled.

M. G. STEVENSON, N. P.

Said chattel mortgage endorsed as follows to wit: No. 1334, 1335. Chattel mortgage. From W. B. Grimes Jr. Ashland Kansas to Siegel-Sanders Live Stock Commission Co.

State of Kansas, Clark county, *ss.* A copy of this instrument was filed for record on the 25th day of April, A. D. 1901, at 8 o'clock, a. m. and duly recorded in Book 6 of M. at page 132. Manfred Brown, register of deeds. Fee $— p'd. Siegel-Sanders Live Stock Commission Co. Capital stock $250,000.00. Live stock exchange, Kansas City Mo.

Said petition is endorsed as follows, to wit: 260 National Live Stock Bk. of Chicago *vs.* First National Bank of Geneseo, Ills. Petition. Filed May 28th, 1901. M. C. Hart, clerk. By W. H. O'Brien, dept. Winston & Meagher and Stanley, Vermilion and Evans.

22 On the 28th day of May, A. D., 1901, there was filed in the office of the clerk of said court, in said cause, a præcipe for a writ of summons, a true, full and complete copy of which is in the words and figures following, to wit:

Præcipe for Summons.

In the District Court of Woodward County, Territory of Oklahoma.

THE NATIONAL LIVE STOCK BANK OF CHICAGO
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS; WM. HIXON, and JOHN PARR. } No. 260.

To the clerk of said court:

Issue summons in the above-entitled case and direct the same to the sheriff of Woodward county, Territory of Oklahoma, to or for all defendants.

Action brought for recovery of personal property of value $15,389.54 and $2000. damages interest at 7% from May 25th, 1901.

Make summons returnable 7th day of June 1901. Defendants required to answer on or before the 27th day of June 1901.

Dated this 28th day of May, A. D., 1901.

WINSTON & MEAGHER &
STANLEY, VERMILION & EVANS,
Attorneys for Plaintiff.

Said præcipe endorsed as follows to wit: No. 260. Præcipe for summons. District court Woodward county. The Nat'l L. S. Bank of Chicago, plaintiff, *vs.* The 1st Nat'l Bank of Geneseo, Ills Wm. Hixon and John Parr, defendants. Filed May 28th 1901. M. C. Hart, clerk. By W. H. O'Brian, deputy. Winston & Meagher — Stanley, Vermilion & Evans attorneys for p'l't'f.

Thereupon, on the 28th day of May, A. D., 1901, a writ of summons was issued by the clerk of said court, in said cause, a true, full and complete copy of which is in the words and figures following to wit:

Summons.

TERRITORY OF OKLAHOMA, } *ss.*:
Woodward County, }

Territory of Oklahoma to the sheriff of Woodward county:

You are hereby commanded to notify William Hixon and John Parr and the First National Bank of Geneseo, Illinois, that
23 they have been sued by the National Live Stock Bank of Chicago, in the district court of Woodward county, Territory

of Oklahoma and that they must answer the petition of said The National Live Stock Bank of Chicago, filed against them in the clerk's office of said court, on or before the 27th day of June, 1901, or said petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on or before the 7th day of June, 1901.

Given under my hand and seal of said court, this 28th day of May, 1901.

M. C. HART, Clerk,
[SEAL.] By W. H. O'BRIAN, Deputy.

Said writ of summons is endorsed as follows, to wit: No. 260 Summons. The National L. S. Bank of Chicago vs. The First National Bank of Geneseo, Ills. William Hixon and John Parr. Issued May 28th, 1901. Returnable June 7, 1901. Answer due June 27, 1901. Filed June 3, 1901. M. C. Hart, clerk. W. H. O'Brian, deputy. Suit brought for recovery of personal property or if said property can not be had for its value, also $2000. damages if defendant fail to answer judgment will be taken for the recovery of personal property or if it can not be had its value $15389.50 also $2000 damages with interest at the rate of 7 per cent. per annum from the 25th day of May, 1901, and costs of suit. M. C. Hart, clerk. W. H. O'Brian, dept.

On the 3rd day of June, 1901, said summons was returned to the office of the clerk of said court with the return of service endorsed thereon, a true full and complete copy of which is in the words and figures following, to wit:

I received this summons on the 28th day of May, 1901 at — o'clock —. m. and executed the same in my county by delivering a true copy of the within summons, with all endorsements thereon to First Nat'l Bank Geneseo, Ill, Hixon and Parr rep.

A. S. WOODS,
Sheriff of Woodward County, Territory of Oklahoma.

Fees. Service and return.
$12.00 Total $13.25. $.75 2 copy .50 attendance 120 miles.

24 On the 28th day of May, A. D. 1901, there was filed in the office of the clerk of said court, in said cause, a bond in replevin, a true, full and complete copy of which is in words and figures following to wit:

Replevin Bond.

TERRITORY OF OKLAHOMA, } ss:
Woodward County, }

In the District Court in and for the County and Territory Aforesaid.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLS.; WM. HIXON, and John Parr, Defendants.

Whereas the National Live Stock Bank of Chicago has commenced an action against the First National Bank of Geneseo, Ills., Wm. Hixon and John Parr, for the recovery of the possession of certain personal property belonging to said plaintiff.

Now, we, the undersigned, residents of said county and Territory, bind ourselves to said defendant, in the sum of thirty-one thousand dollars, that said plaintiff shall duly prosecute the above action, and pay all costs and damages that may be awarded against him, and, if a return of the property therein delivered to him be adjudged, that he will deliver the same to said defendant.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLS.,
By E. W. EVANS, Att'y.
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By A. H. HOUSTON, Member of Local Board.

[SEAL.]

Attest:
HARRY W. PENTECOST,
Att'y in Fact and General Agent for Oklahoma.

Approved by me this 28th day of May, A. D. 1901.
M. C. HART, Clerk,
By W. H. O'BRIAN, Deputy.

25 Said bond is indorsed as follows to wit: No. 260. Replevin bond. The Nat'n'l L. S. Bank of Chicago, plaintiff, *vs.* First Nat'l Bank of Geneseo, Ills. Wm. Hixon and John Parr, defendant. Approved and filed this 28th day of May A. D. 1901. M. C. Hart, clerk, by W. H. O'Brian, deputy. Recorded in bond record at page 207.

On the 28th day of May, A. D., 1901, there was filed in the office of the clerk of the said court in said cause an affidavit for replevin a true, full and complete copy of which is in the words and figures following to wit:

In the District Court of Woodward County, Oklahoma Territory.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS; WILLIAM Hixon, and John Parr, Defendants.

Affidavit for Replevin.

STATE OF KANSAS, } ss:
Sedgwick County, }

Before me the undersigned a notary public within and for the county and State aforesaid, personally appeared Earle W. Evans, of lawful age, who being by me first duly sworn upon his oath deposes and says:

My name is Earle W. Evans, and I am one of the attorneys for the plaintiff in the above entitled action and duly authorized to make this affidavit.

That said plaintiff is the owner and entitled to the immediate possession of the following described personal property, to wit: six hundred and six head of cattle of the following description, that is to say: one hundred and sixteen head of three year old native steers, and four hundred and ninety head of two year old native steers, each and all of said above described cattle being branded thus: 26 on the thigh of left hind leg, and that the actual value of said personal property is fifteen thousand, three hundred eighty-nine and 54/100 dollars. That is to say, that the actual value of each of the one hundred and sixteen head of three year old native steers above described is $35.5127, and the actual value of each of the said four hundred and ninety head of two year old native steers above described is twenty-three dollars. And that altogether and including both ages and kinds above described the aggregate actual value is fifteen thousand, three hundred eighty nine and 54/100 dollars.

That plaintiff's ownership of said property is specially and by virtue of a certain chattel mortgage duly executed and delivered by one W. B. Grimes, Jr. to Siegel-Sanders Live Stock Commission Company, and by said Siegel-Sanders Live Stock Commission Company sold, assigned and delivered to said plaintiff. Which said chattel mortgage describes said above described personal property and was executed by the said W. B. Grimes, Jr., to secure the payment of fifteen thousand, three hundred eighty-nine and 54/100 dollars, which is still owing and wholly unpaid. That said chattel mortgage and the notes thereby secured are mentioned in the action above entitled, and copies of the same to the petition therein duly annexed, and are hereby expressly referred to and made a part hereof. That plaintiff is entitled to the immediate possession of the

property above described and that the same is wrongfully detained by the defendants above named. And affiant states further that said property above described was not, nor was any part thereof, taken in execution or any order or judgment against said plaintiff or for the payment of any tax, fine or amerc-ment assessed against it or by virtue of an order of delivery issued under article ten of the act known as the Code of Civil Procedure of Oklahoma Territory, or any other provision of the statutes of Oklahoma or any other mesne or final process issued against said plaintiff.

EARLE W. EVANS.

27 Subscribed in my presence and sworn to before me by the above named Earle V. Evans, on this 27th day of May, 1901.

JESSIE B. KENDLE,
Notary Public.

[SEAL.]

My term expires Sept. 7th, 1904.

Said affidavit is endorsed as follows, to wit: No. 260. National Live Stock Bk. of Chicago *vs.* First Nat. Bk. of Geneseo, Ills. Affidavit. Filed May 28th, 1901. M. C. Hart, clerk. By W. H. O'Brian, dept.

Thereupon on the 28th day of May, A. D. 1901, an order of delivery was issued by the clerk of said court, in said cause, a true, full and complete copy of which is in the words and figures following, to wit:

Order of Delivery.

TERRITORY OF OKLAHOMA, } ss:
Woodward County, }

Territory of Oklahoma to the sheriff of said county, Greeting:

Whereas the National Live Stock Bank of Chicago have commenced an action in the district court in and for the county of Woodward in the Territory of Oklahoma, against William Hixon and John Parr, and the First National Bank of Geneseo, Ills. for the recovery of the following described specified personal property, to-wit:

606 head of cattle, described as follows, 116 head of 3 year old native steers and 490 head of 2 year old native steers, branded as follows: on thigh of left hind leg, of the value of $15389.54/100 dollars, and has filed an affidavit and an undertaking to obtain an order for the immediate delivery of said property:

These are therefore to command you, the said sheriff, to take the said personal property and deliver the same to the said The
28 National Live Stock Bank of Chicago, and of this order, with your proceedings thereon, you will make due return on the 7th day of June A. D., 1901.

Witness my hand and the seal of said court affixed at my office in Woodward in said county, this the 28th day of May A. D. 1901.

[SEAL.]

M. C. HART, Clerk,
By W. H. O'BRIAN,
Deputy Clerk.

Said order of delivery is endorsed as follows, to wit: No. 260. Order of delivery. District court, Woodward county, O. T. The Nat'n'l L. S. Bank of Chicago *vs.* The First Nat'n'l Bank of Geneseo, Illinois. William Hixon, John Parr. Issued May 28 A. D. 1901. Returnable June 7 A. D., 1901. Filed June 3 A. D., 1901. M. C. Hart, clerk. W. H. O'Brian, deputy clerk.

On the 3rd day of June said order of delivery was returned to the office of the clerk of said court with the return of service endorsed thereon, a true, full and complete copy of which is in the words and figures following to wit:

Sheriff's Return.

I hereby served the within process by taking 321 2 year old and 53 3 year old steers and after holding same 3 days delivered the same to the within named plaintiff.

No. 321 2 year old steers.
53 3 yr. " "

Service	.50
Holding cattle 3 days	6.00
	$6.50

A. S. WOODS, Sheriff,
By S. L. METZ, Dpt.

On the 11th day of June, 1901, there was filed in the office of the clerk of said court, in said cause, an answer, a true, full and complete copy of which is in the words and figures following, to wit:

In the District Court of 1st Judicial District of Oklahoma Territory
Sitting in and for Woodward County, Territory Aforesaid.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, Pl'f,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS; WM. HIXON, and JOHN PARR, Def't-. } Answer.

29 The defendants, The First National Bank of Geneseo, Illinois, Wm. Hixon and John Parr, in answer to the petition of

the plaintiff herein, say that they deny generally and specifically each and every and all the allegations in said petition contained.

THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS,
WM. HIXON, AND
JOHN PARR, Def'ts,
By BOTSFORD, DEATHERAGE & YOUNG AND HOUSTON AND MARUM, Att'ys.

Said answer is endorsed as follows, to wit: No. 260. The National Live Stock Bank of Chicago *vs.* First National Bank of Geneseo, Ills. *et al.* Answer. Filed June 11th, 1901, M. C. Hart, clerk, by W. H. O'Brian, deputy.

On the 14th day of March A. D. 1901 there was filed in the office of the clerk of said court, in said cause, a stipulation, a true, full and complete copy of which is in the words and figures following to wit:

In the District Court of Woodward County, Oklahoma.

NATIONAL LIVE STOCK BANK OF CHICAGO, Plaintiff,
vs.
WILLIAM HIXON ET AL., Defendants.

Stipulation.

It is hereby stipulated and agreed by attorneys for plaintiff and defendants that plaintiff may file, in this action, its amended petition on or before the 15th day of March, 1902, and that defendants may have until 1st day of April, 1902, in which to plead thereto.

WINSTON & MEAGHER AND
STANLEY, VERMILION & EVANS,
Attorneys for Plaintiff.

HOUSTON & MARUM,
BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Defendants.

Said stipulation is endorsed as follows, to wit: No. 260. National Live Stock Bank of Chicago, *vs.* First National Bank of Geneseo *et al.* Stipulation. Filed March 14, 1902. T. A. Neal, clerk. By W. H. O'Brian, deputy.

30 On the 14th day of March A. D., 1902, there was filed in the office of the clerk of said court, in said cause, an amended petition a true full and complete copy of which is in the words and figures following to wit:

In the District Court of Woodward County, Oklahoma Territory.

NATIONAL LIVE STOCK BANK OF CHICAGO, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS; WILLIAM HIXON, and JOHN PARR, Defendants.

Amended Petition.

For its amended petition and for its cause of action against the above named defendants, plaintiff alleges:

That plaintiff is now and for more than two years last past has been a national banking corporation duly chartered, organized and existing under and by virtue of the laws of the United States of America.

That defendant, The First National Bank of Geneseo, Illinois, is now and for more than two years last past has been a national banking corporation duly chartered, organized and existing under and by virtue of the laws of the United States of America.

That on to wit: the 17th day of April A. D., 1901, one W. B. Grimes Jr., duly executed and delivered unto Siegel-Sanders Live Stock Commission Company, a corporation duly chartered, organized and existing under and by virtue of the laws of the State of Missouri, his two certain promissory notes in writing of that date, by the terms of each of which on the 27 day of October A. D., 1901, he promised to pay to the order of said Siegel-Sanders Live Stock Commission Company, the sum of seventy-six hundred, ninety-four and 77/100 dollars, with interest at the rate of seven per cent. per annum until paid.

31 That at the time of the execution and delivery of said promissory notes as aforesaid, the said W. B. Grimes, Jr., for the purpose of securing the payment of the same, duly executed and delivered unto the said Siegel-Sanders Live Stock Commission Company, his one certain chattel mortgage or conveyance dated April 17th, 1901, whereby and by the terms of which he did convey unto the said Siegel-Sanders Live Stock Commission Company, six hundred and six head of cattle as follows: One hundred and sixteen head of three year old native steers. Four hundred and ninety head of two year old native steers, all branded thus: on left hind thigh or hip. That at the date of the execution and delivery of said notes and said mortgage, and for more than thirty days thereafter, the said W. B. Grimes was a resident and citizen of Clark county Kansas, and the cattle above described, and each and every head thereof, were in Clark county Kansas.

That thereafter and on to wit: the 25th day of April, A. D. 1901 at eight o'clock a. m. a true and correct copy of said chattel mortgage was filed for record in the office of the register of deeds of Clark

county, Kansas, and thereafter duly recorded in Book Six at page one hundred thirty-two.

That there is now and at all of the times hereinbefore and hereinafter mentioned, there was, in full force and effect in the State of Kansas, a statute duly enacted, promulgated and published, as provided by law and in the General Statutes of Kansas 1868, chapter 68, section 9, being the same as published in General Statutes of Kansas 1899 by Dassler, general section No. 4060 as follows:

"4060. Void unless.—SEC. 29. Every mortgage or conveyance intending to operate as a mortgage of personal property, which shall not be accompanied by an immediate delivery and be followed by
an actual and continued change of possession of the things
32 mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property shall be situated or if the mortgagor be a resident of this State then of the county of which he shall at the time be a resident. (G. S. 1868, ch. 68, sec. 9.)"

That there is now and at all the times hereinafter and hereinbefore mentioned, there was in full force and effect in the State of Kansas, a statute duly enacted, promulgated and published as provided by law and in the General Statutes of Kansas of 1868, chapter 68, section 15, being the same as published in the General Statutes of Kansas, 1899, by Dassler, general section 4068, as follows:

"Possession.—SEC. 35. In the absence of stipulation to the contrary, the mortgagee of personal property shall have the legal title thereto, and the right of possession. (*Id.* sec. 15)"

That except as hereinbefore set forth, there is not now and was not at any of the time- hereinbefore and hereinafter mentioned any other statute or law of the State of Kansas regulating the execution or the filing of chattel mortgages within said State, and that under said section as interpreted by the court and bar of the State of Kansas and under the State of Kansas, as it now is and as it was at said time, it is not and was not essential to the validity of a chattel mortgage or its being filed of record and imparting full and complete notice, that the same be signed or executed in the presence of any number of witnesses.

And plaintiff alleges that said section- above set forth are, and at
said times were, the law of the State of Kansas regarding the
33 matters and things therein mentioned.

That after the execution and delivery of said promissory notes as aforesaid, and before the maturity thereof, the Siegel-Sanders Live Stock Commission Company, by R. D. Swain, its duly elected, qualified and acting treasurer, he being then and there duly authorized so to do, duly sold said promissory notes and each of them to this plaintiff, by its written endorsement duly executed on the back of each of said notes.

That true and correct copies of said notes and the endorsements

thereon, are attached to the original petition on file herein, mark' respectively Exhibits "A" and "B" and made a part thereof, which said copies of said notes are hereto expressly referred to, adopted and made a part hereof.

That a true and correct copy of said chattel mortgage is attached to the original petition on file herein, marked Exhibit "C" and made a part thereof, which said copy of said mortgage is hereto expressly referred to, adopted and made a part hereof.

The plaintiff is now the owner and holder of said notes above referred to, and each of them, and is now the owner and holder of said mortgage so given to secure the payment of the same as aforesaid.

That by the terms of said chattel mortgage, as will more fully appear by reference to Exhibit "C" it is provided that if default be made in the payment of the sum of money by said mortgage secured, or any part thereof, or any interest thereon, according to the tenor and effect of said indebtedness when the same becomes due and payable, or upon failure to conform to or comply with any of
the conditions and agreements in said mortgage mentioned,
34 then the whole sum of money by said mortgage secured shall,
at the option of the legal holder of said notes become due and payable at once without notice. And it is further provided in said mortgage that in case of sale or disposal, or attempt to sell or dispose of the property so mortgaged, or a removal or an attempt to remove the same from the premises where the same were at the time of their being mortgaged, or any unreasonable depreciation of value, or if from any other cause the security shall become inadequate, or the holder of said notes shall deem itself insecure at any time before said indebtedness is fully paid, whether the same be due or not, then and thenceforward it shall be lawful for the holder of said notes, or their authorized agent, to enter upon the premises of the said mortgagor, or any other place or places where the said property aforesaid may be, to remove and dispose of the same without resort to law, and without appraisement or notice, (all right to redemption, appraisement and notice of foreclosure required by law being thereby expressly waived). And all the equity of redemption of the said mortgagor at public auction or private sale.

Plaintiff alleges that the conditions of said mortgage have been and are broken, and that said cattle have been removed from the premises whereon they were situated at the time of the execution of said mortgage, and have been removed from Clark county Kansas, and have been disposed of, or an attempt made to sell or dispose of the same. That plaintiff deems itself insecure and had elected and does elect to declare the terms of said mortgage broken, and to take possession of said property in said mortgage described as under and by virtue of the terms of said mortgage it has a right to do.

That said personal property hereinbefore mentioned is now
35 in the possession of the defendants above named, who wrongfully and without right either at law or equity detain and hold the same from the plaintiff.

That on to wit: the 25th day of May A. D. 1901, the plaintiff made due and legal demand upon the defendants for the surrender to it of the possession of said personal property but that the said defendants have refused and do refuse to surrender the same, and do co-tinue to hold possession thereof from the plaintiff. That the actual value of said personal property above described is fifteen thousand three hundred eighty-nine and 54/100 dollars.

That by reason of the wrongful detention of the said personal property as aforesaid by the said defendants and their with-olding the same in the manner aforesaid from the plaintiff, the plaintiff has been damaged in the sum of two thousand dollars.

Wherefore, the plaintiff prays for the possession of the said personal property herein before described, and if the same can not be had for the sum of fifteen thousand, three hundred eighty-nine and 54/100 dollars, with interest from this date at the rate of seven per cent. per annum and for the further sum of two thousand dollars damages, with interest at the rate of seven per cent. per annum from this date, and for the costs of this suit, and such other and further relief as to the court may seem equitable and just in the premises.

WINSTON, BABCOCK, STRAWN & SHAW AND
STANLEY, VERMILION & EVANS,
Attorneys for Plaintiff.

Said amended petition is endorsed as follows, to wit: No. 260 National Live Stock Bank of Chicago *vs.* First National Bank of Geneseo, Ills. *et. al.* Amended petition. Filed M'ch 14th, 1902 T. A. Neal, clerk. By W. H. O'Brian, deputy.

36 On the first day of April, A. D., 1901, there was filed in the office of the clerk of said court, in said cause, an answer, a true, full and complete copy of which is in the words and figures following, to wit:

In the District Court of Woodward County, Oklahoma Territory.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS; Plaintiff,
vs.
FIRST NATIONAL BANK OF GENESEO, ILLINOIS; WILLIAM HIXON, and John Parr, Defendants.

Answer to Amended Petition.

Now comes the First National Bank of Geneseo, Illinois, by its attorneys, and for its answer to plaintiff's amended petition herein filed alleges and states:

First. Defendants admits that plaintiff is now and for more than two years last past has been a national banking corporation, duly organized under the laws of the United States.

Second. Defendant admits that it is a duly organized corporation, and has been for the last three years a national banking corporation existing under and by virtue of the laws of the United States.

Third. Defendant denies each and every allegation alleged in plaintiff's amended petition, except as above admitted.

Fourth. Defendant states that on the 27th day of June, 1900, one W. B. Grimes Jr. duly executed and delivered to Siegel-Sanders Live Stock Commission Company his certain promissory note in writing, dated June 27, 1900, by the terms of which he promised to pay to the order of Siegel-Sanders Live Stock Commission Company, on the 1st day of November 1900, the sum of eleven thousand one hundred and eleven and 23/100 ($11,111.23) dollars with
37 interest at the rate of eight per cent. per annum until paid.

That at the time of the execution and delivery of said promissory note, said W. B. Grimes, Jr., for the purpose of securing the payment of the same, duly executed and delivered to said Siegel-Sanders Live Stock Commission Company his certain chattel mortgage or conveyance dated June 27th, 1900, whereby and by the terms of which he did convey unto said Siegel-Sanders Live Stock Commission Company five hundred twenty-six (526) head of cattle as follows: Four hundred forty-three (443) head of native, full age one year old steers, and eighty-three (83) head of native, full age, two year old steers, all branded with a bar on the thigh, being cattle owned by the mortgagor, and then held and grazed in his enclosed pastures, located near Ashland in Clark county, Kansas, where said cattle were to be held and cared for. That at the time of the execution and delivery of said mortgage, said W. B. Grimes, Jr., was a resident of Clark county, Kansas, and that said cattle as above described were located in Clark county, Kansas.

That thereafter, on the 12th day of July, 1900, at eight o'clock a. m. a true copy of said mortgage was duly filed for record in the office of the register of deeds of said Clark county, Kansas, and thereafter duly recorded in Book 6 of M. at page 127, the filing and recording of which was duly certified by the register of deeds on the back of the original mortgage.

That there is now, and at all the times hereinbefore mentioned, was, in full force and effect in the State of Kansas, a statute duly enacted and published as provided by law and in the General Statutes of Kansas of 1898, chapter 68, sec. 9, being the same as
38 published in the General Statutes of 1899 by Dassler, general section No. 4060, as follows:

"4060. Void unless.—SEC. 29. Every mortgage or conveyance intended to operate as a mortgage of personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where

the property shall then be situated, or if the mortgagor be a resident of this State, then of the county of — he shall at the time be a resident. (G. S. 1868, ch. 68, sec. 9.)"

That there is now, and at all the times hereinbefore and hereinafter mentioned was, in full force and effect in the State of Kansas, a statute duly enacted and published as provided by law in the General Statutes of 1899 by Dassler, general section 4061, sub-section 30, to wit:

"Upon the receipt of any such instrument, the register shall endorse on the back thereof at the time of receiving it, and shall file the same in his office, to be kept there for the inspection of all persons interested."

That there is now and at all the times hereinafter and hereinbefore mentioned was, in full force and effect in the State of Kansas, a statute duly enacted and published as provided by law in the General Statutes of Kansas of 1868, chapter 68, section 15, being the same as published in the General Statutes of Kansas of 1899 by Dassler, general section 4066, as follows:

"Possession.—SECTION 35. In the absence of stipulations to the contrary, the mortgagee of personal property shall have the
39 legal title thereto, and the right of possession. *Id.* sec. 15."

That after the execution and delivery of said promissory note as aforesaid, and before the maturity thereof, said Siegel-Sanders Live Stock Commission Company, by Frank Siegel, its duly elected, qualified and acting president, and being then and there duly authorized so to do, duly sold said promissory note to this defendant, for a valuable consideration to it paid by defendant, and duly endorsed the same on the back thereof, and delivered said note and the aforesaid mortgage to said defendant. That a true and correct copy of said note and the endorsements thereon is hereto attached, made a part hereof, and marked Exhibit "A" and that a true and correct copy of said chattel mortgage is hereto attached, made a part hereof, and marked Exhibit "B."

That defendant is now and has been ever since the sale and delivery of said note and mortgage, the owner and holder of the same, and is now the owner and holder of said note and mortgage given to secure the payment of said described note.

That by the terms of said chattel mortgage, as will more fully appear by reference to Exhibit "B," it is provided that if default be made in the payment of the sum of money or any part thereof, or the interest thereon, according to the tenor and effect of said indebtedness, when the same becomes due and payable, or upon a failure to conform to or comply with any of the conditions and agreements mentioned in said chattel mortgage marked Exhibit "B," then the whole sum thereby secured shall at the option of the said party of the second part, or the legal holder or holders of said note, become due and payable without notice, and it is further provided in said mortgage that in case of a sale or disposal or attempt to sell or dispose of the goods and chattels described therein, or a

removal or attempt to remove the same from the premises
40 where said property was located or an unreasonable depreciation in value, or if from any other cause the security shall become inadequate, or the party shall deem itself insecure at any time before the indebtedness is fully paid, whether due or not, then and thenceforth it shall be lawful for said party of the second part in said mortgage described, its successors or assigns, or its authorized agent, to enter upon the premises of the said party of the first part, or any other place where said goods or live stock may be and to remove and dispose of the same as aforesaid, without resort to law and without appraisement or notice, all right of redemption, appraisement and notice of foreclosure required by law being expressly waived, and all equity of redemption of said party of the first part, at public auction or private sale, to the person who shall pay the highest price for the same, and out of the avails thereof to retain the full amount of said allegation.

Defendant alleges that the conditions of said mortgage have been broken, and are broken; that default has been made in the payment of said debt and the interest thereon, and that the cattle have been removed from the premises in Clark county, Kansas, where they were situated at the time of the execution of the mortgage, and defendant deems itself insecure and did so at the time of the removal of said cattle from Clark county Kansas, and was entitled to the possession of said cattle under said mortgage aforesaid.

That the cattle levied upon and taken possession of by the sheriff, under the order of delivery herein, were of the value of thirty dollars ($30.00) per head, and were the same cattle described in said chattel mortgage marked Exhibit "B" and that defendant was the owner of and entitled to the possession thereof and was in possession of
41 the same by reason of the aforesaid chattel mortgage, and that the lien of said chattel mortgage is first and prior to the lien of plaintiff, and that plaintiff had due notice thereof.

That defendant has been damaged by reason of the taking and detention of said property in the sum of twenty five ($2500.00) — dollars;

Wherefore plaintiff prays for the possession of said property so taken, and if the same can not be had, then for the value thereof at the time of their taking, with interest thereon from said date at the rate of eight per cent. per annum and for the sum of twenty-five hundred ($2500.00) dollars damages, with interest at six per cent. per annum from this date, and for the costs of this suit and such other and further relief as to the court may seem equitable and just in the premises.

HOUSTON & MARUM &
BOTSFORD, DEATHERAGE & YOUNG,
Att'ys for Defendant Bank.

Copy.

EXHIBIT "A."

Siegel-Sanders Live Stock Commission Company.

Capital Stock, $250,000.00.

Rooms 73–74–75, Live Stock Exchange.

KANSAS CITY, Mo., June 27th, 1900.

November 1, 1900 after date I, we or either of us, promise to pay to the order of Siegel-Sanders Live Stock Commission Company, at their office, eleven thousand one hundred eleven & 23/100 dollars, $11,111.23, with interest from maturity at the rate of 8 per cent. per annum until paid. Value received.

W. B. GRIMES, JR.

No. 604. Due ——.

On the back of said notes are the following indorsements: "For value received we hereby assign this note to —— —— or order and waive demand, notice and protest of same, and guarantee payment thereof at maturity. Siegel-Sanders Live Stock Commission Co. by Frank Siegel president." This mortgage securing this note is duly stamped according to law"

42 EXHIBIT "B."

Know all men by these presents. That W. B. Grimes, Jr., party of the first part, in consideration of the sum of eleven thousand eleven hundred eleven and 23/100 dollars, paid by Siegel-Sanders Live Stock Commission Company, a corporation, party of the second part, the receipt whereof is hereby acknowledged, have sold, assigned and deliver-d, and by these presents does sell, assign and deliver unto the said second party, all the following articles of personal property, situated in the county of Clark and State of Kansas, to wit:

(526) five hundred twenty six head of cattle as follows:

(443) four hundred forty three head of native full aged one year old steers.

(83) eighty three head of native full age two year old steers.

All of the above cattle branded thus:

Being all the cattle owned by me in this brand, and being the same cattle now being held and grazed by themselves in my enclosed pasture located near Ashland, in Clark county Kansas, where they are to be held and are not to be moved or sold without notice to and the written consent of said party of the second part.

And being all the property of the above description owned or controlled by the mortgagor now on said premises and this mortgage is intended to cover and include all of said property of the above description and any addition and increase thereto located on the *the* above described premises and range, if any thereabouts. The marks and brands used above to describe said property are the holding marks and brands and carry the title, although said property may have other marks and brands. If the mortgagor should desire to mix any other property with the above, before doing so, he shall give a full description of said property intended to be so mixed with the name of the owner thereof, to said second party and obtain the written consent of said second party before mixing the same. This mortgage shall also cover and include all the right, title and interest of the mortgagor in and to the pasturage, feed pens,
43 feed troughs and water privileges used in feeding said live stock. Said property to remain and be kept on the premises above described until the full payment of the indebtedness hereinafter described, unless sooner marketed or removed by and with the written consent of the mortgagee or its assigns. When marketed said cattle are to be shipped and consigned for sale to Siegel-Sanders Live Stock Commission Company, at Kansas City stock yards, and when sold the proceeds thereof shall be applied first in payment of the usual and customary commissions to said Siegel-Sanders Live Stock Commission Company for selling same, and the balance, or so much thereof as may be necessary, shall be applied on the indebtedness hereinafter described. If said cattle or any part thereof, be consigned or sold elsewhere than above, then said mortgagee shall be paid a commission of 50 cents per head on all the above described cattle.

Provided always, and these presents are upon this express condition that if said party of the first part shall pay or cause to be paid unto the said party of the second part, the aforesaid sum of eleven thousand eleven hundred eleven & 23/100 dollars (11,111.23) according to the terms of one promissory note as follows:

One note for $11,111.23 dated June 27th, 1900, payable November 1st, 1900, after date.

All payable at the office of said Siegel-Sanders Live Stock Commission Company, Kansas City, and all with interest thereon at the rate of 8 per cent. per annum from maturity or according to the terms of any renewal or extension of said indebtedness which may be made by consent of said second party, its successors or assigns and may be evidenced by the execution of a new note or notes in place of said original indebtedness at or after maturity, for the amount of the debt then unpaid and payable hereunder, and for which this mortgage is and shall be a continuing security until paid,
44 whether said debt be evidenced by said original indebtedness above described or any renewals or extensions thereof, and which said indebtedness the party of the first part hereby agree- to pay on the maturity thereof, then these presents and everything

herein contained shall be void, anything herein contained to the contrary notwithstanding. And it is hereby mutually covenanted and agreed between the parties hereto, that if default be made in the payment of said sum of money, or any part thereof, or the interest thereon, according to the tenor and effect of said indebtedness, when the same became due and payable, or upon a failure to conform to or comply with any of the conditions and agreements herein mentioned, then the whole sum of money hereby secured shall at the option of the party of the second part, or the legal holder or holders of said note or notes, become due and payable at once without notice. And it is further agreed that in case of sale or disposal, or attempt to sell or dispose of the goods and chattels hereby mortgaged, or a removal of, or attempt to remove the same from the premises aforesaid or an unreasonable depreciation in value or if from any other cause the security shall become inadequate, or the party of the second part shall deem itself insecure at any time before said indebtedness is duly paid whether the same be due or not, then and thenceforth it shall be lawful for the party of the second part, its successors or assigns or its authorized agent, to enter upon the premises of the said party of the first part, or any other place or places wherein said goods and chattels or live stock aforesaid may be, to remove and dispose of the same as aforesaid without resort to law, and without appraisement or notice (all right of redemption, appraisement and notice of foreclosure required by law being hereby expressly waived) and all the equity of redemption of the said party of the first part, at public auction or private sale, to the person or persons who shall pay the highest price for the same, and out of the avails thereof to retain the full amount of said obligation with the interest thereon, according to the conditions thereof with all reasonable costs and expenses attending the same and commissions aforesaid, rendering to said party of the first part, or his legal representatives, the surplus money, if any there be, anything herein to the contrary notwithstanding. And until default be made as aforesaid, or until such time as the said party of the second part shall deem itself insecure as aforesaid, the party of the first part to continue in the peaceable possession of all said goods and chattels, all of which in consideration thereof, he agrees, shall be kept in as good condition as the same now are, and taken care of at his own proper cost and expense, and upon the neglect or failure of said first party so to do, then said second party, its successors or assigns may cause the same to be done, and for all expenses so incurred and sums expended this obligation shall be a continuing security; and if from any cause said property shall fail to satisfy said debt and interest aforesaid, said party of the first part hereby agrees to pay the deficiency.

For the purpose of obtaining the money at this time loaned by the second party and the benefit of future transactions the first party states that the first party is absolute owner of all of the above described property; that the same is free from any incumbrances, and

that all of the same is now in the possession of the said first party at the location.

In witness whereof, the party of the first part *have* hereunto set *their* hand and seal this 27th day of June in the year of our Lord, one thousand nine hundred.

W. B. GRIMES, JR.

Signed, sealed and delivered in the presence of
M. G. STEVENSON.

46 STATE OF KANSAS, } ss:
County of Clark, }

Be it remembered that on the 5th day of July A. D., 1900, before the undersigned, a notary public duly commissioned and acting as such within and for the county of Clark aforesaid, personally came W. B. Grimes, Jr. to me well known to be the grantor described in and who executed and whose name is subscribed to the foregoing instrument of writing as party thereto and stated and acknowledged to me that he executed the same as his free act and deed for the purposes and considerations therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in Ashland in said county the day and year first above written.

My term of office as notary public will expire Oct. 5th, 1904.

M. G. STEVENSON,
[SEAL.] Notary Public.

2570 W. B. Grimes Jr. Security steers 526. $11111.23 Due 11/1-4/1900 Rev. $5.25

Said Exhibit "B" is endorsed as follows, to wit: Copy. No. 604. Chattel mortgage. From W. B. Grimes Jr. Clark Co. Kas. to Siegel-Sanders Live Stock Commission Co. State of Kansas Clark county ss A copy of this instrument was filed for record on the 12th day of July A. D. 1900, at 8 o'clock a. m. and duly recorded in Book 6 of M. at page 127. Manfred Brown register of deeds. Fee $0.25 Siegel-Sanders Live Stock Commission Co. Capital stock $250,000.00 Live stock exchange, Kansas City, Mo. Due renewal affidavit filed June 20 1901.

Said answer is endorsed as follows to wit: No. 260 National Live Stock Bank of Chicago *vs.* First National Bank of Geneseo, Illinois, *et al.* Filed April 1st, 1902. T. A. Neal, clerk, W. H. O'Brian, deputy.

47 On April 10th A. D., 1902, there was filed in the office of the clerk of said court, in said cause, a reply, a true, full and complete copy of which is in the words and figures following, to-wit:

In the District Court of Woodward County, Oklahoma Territory.

NATIONAL LIVE STOCK BANK OF CHICAGO, Plaintiff,
vs.
FIRST NATIONAL BANK OF GENESEO, ILLINOIS; WILLIAM HIXON, and John Parr, Defendants.

Reply to Answer of First National Bank of Geneseo, Illinois, to Amend Petition.

Comes now the plaintiff in the above entitled action and for reply to the answer of the defendant, The First National Bank of Geneseo, Illinois, to the plaintiff's amended petition filed herein, alleges:

That plaintiff denies each and every allegation in said answer contained which is not consistent with plaintiff's said amended petition and which is not hereinafter expressly admitted.

Plaintiff admits the execution and delivery to Siegel-Sanders Live Stock Commission Company of the note and chattel mortgage mentioned and set forth in said defendant's said answer; but plaintiff denies that defendant was at the commencement of this action the owner of said note and mortgage or in any manner interested therein.

3. That no assignment of said chattel mortgage was ever executed and filed for record and that said note and chattel mortgage at all times after its execution and after said chattel mortgage was filed as alleged in defendant's said answer, until its payment and release as hereinafter mentioned, were the exclusive property of the Siegel-Sanders Live Stock Commission Company, the mortgagee
48 therein named.

4. For further reply plaintiff alleges that the said note mentioned in said defendant's answer was paid and fully discharged and the said chattel mortgage so given for the purpose of securing said note paid, cancelled and fully released of record long prior to the commencement of this action, in manner and form as follows, to wit: That on to wit: the 24th day of November, A. D. 1900, said note being then the property of the said Siegel-Sanders Live Stock Commission Company and due, the amount of the same was by the maker thereof, to wit: W. B. Grimes Jr. paid to the said Siegel-Sanders Live Stock Commission Company by the execution and delivery to it of another note for about the sum of fourteen thousand dollars, the exact amount of which said note is to plaintiff unknown, and that on to wit: the 24th day of November A. D. 1900, the said Siegel-Sanders Live Stock Commission Company, by Frank Siegel, its duly elected, qualified and acting president, he being thereunto duly authorized, for said valuable consideration duly executed and delivered its one certain chattel mortgage release, whereby and by the terms of which the said Siegel-Sanders Live Stock Commission

Company, the mortgagee in said chattel mortgage, acknowledged payment of the debt by said chattel mortgage secured, and did thereby release, cancel and finally discharge the said chattel mortgage.

That thereafter and on to wit: the 27th day of November, A. D., 1900, said release was filed in the office of the register of deeds of Clark county Kansas, and the register of deeds thereupon entered the said release and satisfaction of said chattel mortgage upon the chattel mortgage records of said county and thereby released cancelled and finally discharged the said chattel mortgage of record.

49 That a true and correct copy of said release is hereto attached, marked Exhibit "A" and made a part of this reply.

That thereafter the plaintiff herein, replying and depending upon the records in the office of the register of deeds of Clark county, Kansas, and believing therefrom that the cattle mentioned and described in its amended petition, were free and clear of incumbrances, and that the chattel mortgage mentioned and described by the defendant had been fully paid, cancelled and discharged, as by the record of said county it had a right to do, purchased in good faith the note and mortgage set forth in its amended petition herein, and in the manner therein stated.

Wherefore, plaintiff prays for judgment against defendants as prayed in its amended petition on file herein.

WINSTON, BABCOCK, STRAWN & SHAW AND
STANLEY, VERMILION & EVANS,
Attorneys for the Plaintiff.

EXHIBIT "A."

Release of Mortgage.

In consideration of the payment of the debt secured thereby, we the Siegel-Sanders Live Stock Commission Company, of Kansas City Missouri, do hereby release, cancel and finally discharge the deed of trust or mortgage No. 604 covering 526 head of steers branded) left thigh, given by W. B. Grimes, Jr. to secure the payment of eleven thousand one hundred eleven & 23/100 dollars, which said deed of trust or mortgage was dated 6-27-1900, and recorded in the office of the recorder of deeds of Clark county, State of Kansas, in Book — at page —.

Witness the signature and seal of this company this 24th day of November, A. D., 1900.

{ Seal of Siegel-Sanders Live Stock Commission Company, Kansas City, Mo. }

FRANK SIEGEL, P't. [SEAL.]

Said reply is endorsed as follows to wit: No. 260 Nat'n'l Live Stock Bank of Chicago *vs.* First Nat'n'l Bank of Geneseo, Ills. *et al.* Reply. Filed April 10th 1902. T. A. Neal, clerk, by W. H. O'Brian, deputy.

50 On the 24th day of April, A. D., 1902, there was filed in the office of the clerk of said court in said cause, a stipulation, a true, full and complete copy of which is in the words and figures following to wit:

In the District Court of Woodward County, Oklahoma.

NATIONAL LIVE STOCK BANK OF CHICAGO, Plaintiff,
vs.
FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that William Hixon and John Parr named as defendants in the above entitled cause, have not now and never have had a substantial interest therein, but they were at the date of the commencement of this suit and of the order of delivery herein, acting as the agents of and for and on behalf of the said defendant, The First National Bank of Geneseo, Illinois. It is further stipulated and agreed for the considerations aforesaid that the court may enter an order herein dismissing from this suit without costs to them or either of them the said William Hixon and John Parr and without prejudice to the right of the plaintiff to commence another action upon the same cause of action against the said two defendants.

Dated at Woodward, Oklahoma, April 24th, 1902.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILL.,
By WINSTON, BABCOCK, STRAWN AND SHAW AND STANLEY, VERMILION & EVANS,
Its Attorneys.

FIRST NATIONAL BANK OF GENESEO, ILLINOIS,
By BOTSFORD, DEATHERAGE & YOUNG AND HOUSTON & MARUM, Its Attorneys.

Said stipulation is endorsed as follows to wit: No. 260. National Live Stock Bank of Chicago, *vs.* First National Bank of Geneseo. Stipulation dismissing Hixon and Parr. Filed April 24th, 1902. T. A. Neal clerk, W. H. O'Brian, deputy.

51 On the 24th day of April, A. D., 1902, there was filed in the office of the clerk of said court, in said cause, a stipulation, a true full, and complete copy of which is in the words and figures following, to wit:

In the District Court of Woodward County, Oklahoma.

NATIONAL LIVE STOCK BANK OF CHICAGO, Plaintiff,
vs.
FIRST NATIONAL BANK OF GENESEO ET AL., Defendants. } Stipulation.

It is hereby stipulated and agreed by and between the National Live Stock Bank of Chicago, by Winston, Babcock, Strawn and Shaw, and Stanley, Vermillion and Evans, its attorneys, and the First National Bank of Geneseo, Illinois, by Botsford, Deatherage, & Young, and Houston & Marum, its attorneys, as follows, that is to say:

First. That there were in existence at the date of the order of delivery in this suit to wit: May 28, 1901, covered by the chattel mortgage claimed to be owned by the said First National Bank of Geneseo, Illinois, and bearing date June 27, 1900, as well as the chattel mortgage claimed to be owned by the National Live Stock Bank of Chicago, bearing date April 17, 1901, both of which said mortgages were executed by W. B. Grimes, Jr. as mortgagor, to the Siegel-Sanders Live Stock Commission Company, five hundred head of steers.

Second. That for the purpose of this suit the value of the cattle taken by the order of delivery herein, that is to say, three hundred and seventy four head, shall be regarded as at $24.00 per head, at the date of the said order of delivery, May 28, 1901, and that the remainder of said cattle, that is to say, one hundred and twenty six head, may be regarded as -- the value of $24.00 per head.

Third. That the title to the remaining one hundred and twenty-six head of cattle aforesaid, shall abide by and be controlled
52 by the final determination of this suit, and that any judgment order entered in this cause shall include the said one hundred and twenty-six head of cattle, as well as the three hundred and seventy four head recovered by the sheriff under the order of delivery in this cause.

Fourth. That the said parties and each of them hereby waive a jury and submit the said cause to the court for trial, without the intervention of a jury. It being expressly understood that the said parties or either of them do not waive their right of appeal from any judgment which may be entered herein.

Fifth. It is further expressly understood and agreed that by this stipulation the said parties or either of them do not in any way

waive or affect any legal rights or actions which they may have against any party or parties not parties to this cause.

Dated at Woodward, Oklahoma, April 24, 1902.

NATIONAL LIVE STOCK BANK OF CHICAGO,
By WINSTON, BABCOCK, STRAWN & SHAW AND
STANLEY, VERMILION, AND EVANS,
Its Attorneys.

FIRST NATIONAL BANK OF GENESEO ET AL.,
By BOTSFORD, DEATHERAGE & YOUNG,
HOUSTON AND MARUM,
Its Attorneys.

Said stipulation is endorsed as follows, to wit: No. 260 National Live Stock Bank of Chicago *vs.* First National Bank of Geneseo. Stipulations as to certain facts. Filed April 24th, 1902. T. A. Neal, clerk. W. H. O'Brian deputy.

53 On the 24th day of April, A. D. 1902, there was filed in the office of the clerk of said court, in said cause, a stipulation, a true, full and complete copy of which is in the words and figures following:

In the District Court of Woodward County, Oklahoma.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff,
vs.
FIRST NATIONAL BANK OF GENESEO, ILLS.; WILLIAM HIXON, and John Parr, Defendants.

Stipulation.

It is hereby stipulated and agreed, in order to avoid the expense of taking evidence to prove the law of the State of Kansas relative to the above case, that each party, plaintiff and defendants may have the right to use the statutes and session laws of Kansas and the supreme court reports and the appeal reports of said State whether the same have been set up in the pleadings or not, without objection as to the fact whether or not the law has been plead by either plaintiff or defendant.

WINSTON, BABCOCK, STRAWN & SHAW AND
STANLEY, VERMILION & EVANS,
Attorneys for Plaintiff.

HOUSTON & MARUM, BOTSFORD, DEATHERAGE,
Attorneys for Defendants.

Said stipulation is endorsed as follows, to wit: No. 260. Nat'l L. S. Bk. *vs.* 1st Nat'l Bk. Geneseo. Stipulation. Filed Apr. 24 1902 Thos. A. Neal, clerk. W. H. O'Brian, deputy.

54 Be it further remembered that on to wit: the 18th day of April A. D. 1904, there was filed in said cause a stipulation, in words and figures as follows to wit:

55 In the District Court of Woodward County, Oklahoma.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILL., ET AL., Defendants.

Stipulation.

This cause having been tried in the above court and then appealed to and reversed and remanded by the supreme court of Oklahoma Territory, in order to expedite the trial thereof at the —— term of this court, it is agreed by and between these parties, plaintiff and defendants, as follows:

(1.) That a jury be and the same is hereby waived, and this action it is agreed shall be submitted to the court for its decision without the intervention of a jury, as hereinafter provided.

(2.) That this action shall be submitted to the above court upon the same identical evidence that it was submitted to the above court upon the occasion of the former trial, except that in the event either of the parties hereto so desire they may introduce in addition thereto any decision or decisions of the supreme court of the State of Kansas or the Territory of Oklahoma, with the additional admission that since the commencement of this action the cattle herein mentioned have been disposed of and cannot be returned.

(3.) The transcript hereto attached, marked Exhibit A and made a part hereof is a full, true and complete transcript of all of the evidence introduced upon the former trial of this action in the above court, and is a full, true and complete copy of all of the evidence in the case made filed in the supreme court of Oklahoma Territory in the case of First National Bank of Geneseo, Illinois,
56 plaintiff in error, *vs.* The National Live Stock Bank of Chicago, defendant in error, and it is agreed that the transcript so marked Exhibit A, as aforesaid, shall be read in evidence upon the trial of this cause and considered by the court as evidence herein, both of the parties hereto hereby waiving any and all objections to the reading of same, except such objections and exceptions as are made and noted in the said transcript, which said objections and exceptions so made and noted in the transcript it is agreed are to be taken and considered by the court the same as though the evi-

dence was being introduced upon the trial and by the witnesses being personally present in court.

(4.) That all of the pleadings and stipulations heretofore filed in this action are to be taken and considered by the court in determining the issues herein the same as they were taken and considered by the above court upon the occasion of the former trial of this case.

It being the purpose and intention of the parties hereto to submit this action to the above court upon the same pleadings, stipulations and evidence introduced and considered by the court upon the occasion of the former trial, with the addition of such decisions of the supreme court of the State of Kansas and Oklahoma Territory as either of the parties desire to introduce, as aforesaid.

Dated this 6th day of April, 1904.

WINSTON, PAYNE & STRAWN AND
STANLEY, VERMILION & EVANS,
Attorneys for Plaintiff.

BOTSFORD, DEATHERAGE & YOUNG AND
HOUSTON & MARUM, Attorneys for Defendants.

57 In the District Court of Woodward County, Oklahoma Territory.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, *et al.*, Defendants.
} Transcript.

The above cause came on for trial on April 24th, 1902, before said court, at the April, 1902, term of the above entitled court, before Hon. John H. Burford, judge, without the intervention of a jury.

Appearances: For the plaintiff, Winston, Babcock, Strawn & Shaw, and Stanley, Vermilion & Evans. For the defendant-, Botsford, Deatherage & Young, and Houston & Marum.

EXHIBIT "A."

Mr. STRAWN: In this case if the court please, we have made two stipulations, the first of which is a stipulation that an order may be entered by the court, dismissing the case as to the defendants William Hixon and John Parr they being nominal defendants and having no substantial interest in the case, without costs to them or either of them, and without prejudice. That stipulation has been filed.

We have another stipulation, if the court please, I don't suppose that requires an order, but in order that it may be incorporated into the record, I will read it to the court:

(The same is as follows:)

58 In the District Court of Woodward County, Oklahoma.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLS., Plaintiff,
vs.
FIRST NATIONAL BANK OF GENESKO, ILLS.; WILLIAM Hixon, and John Parr, Defendants.
} Stipulation.

It is hereby stipulated and agreed, in order to avoid the expense of taking evidence to prove the law of the State of Kansas relative to the above cause, that each party, plaintiff and defendants may have the right to use the statutes and session laws of Kansas and the supreme court reports and the appeal reports of said State, whether the same have been set up in the pleadings or not, without objection as to the fact whether or not the law has been plead by either plaintiff or defendants.

WINSTON, BABCOCK, STRAWN & SHAW AND
STANLEY, VERMILION AND EVANS,
Attorneys for Plaintiff.

HOUSTON AND MARUM,
BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Defendants.

We have a third stipulation which provided that "There was in existence at the date of the order of delivery in this suit, to wit: May 29, 1901, covered by the chattel mortgage claimed to be owned by the said First National Bank of Geneseo, Illinois, and bearing date June 27, 1900, as well as the chattel mortgage claimed to be owned by the National Live Stock bank, bearing date April 17, 1901, both of which said mortgages were executed by W. B. Grimes, Jr., as mortgagor, to the Siegel-Sanders Live Stock Commission Company."

59 The stipulation is that for the purpose of this suit, there was in existence at the date of the order of delivery covered by these two mortgages, 500 head of steers, and for the purposes of this suit, the value of those steers may be considered and regarded as of $24.00 per head, and that the number of steers taken on the delivery order being 374, that the difference between 500 and 374, or 126, may also be regarded as of the value of $24.00 per head.

And that the title to the remaining 126 head of cattle shall abide by and be controlled by the determination of this suit, and any judgment herein shall include the 126 head of cattle, as well as the 374 head of cattle recovered by the sheriff under the order of delivery in this case.

Said parties and each of them waive a jury and submit the cause to the court for trial, without the intervention of a jury; it being expressly understood that the said parties or either of them do not

waive their right of appeal from any judgment that may be entered herein.

It is further stipulated and agreed by this stipulation the said parties or either of them do not waive any legal right of action which they may have against any party or parties not parties to this cause.

By the COURT: The stipulation does not show where the mortgages were executed or where the stock was?

By Mr. STRAWN: No sir. This case, if the court please, arises out of substantially the following facts: On the 27th day of June 1900, W. B. Grimes, Jr., at that time residing at Ashland, Clark county, Kansas, made a certain promissory note for $11,111. and some cents, payable six months after date, or on Nov. 1, 1900; that note was secured by a chattel mortgage executed by said Grimes upon 526 head of steers; the cattle at that time as I believe is claimed
60 by the defense, being in Clark county Kansas, and the mortgage being executed and filed for record in Clark county, Kansas, and that mortgage was filed for record on the 12th day of July 1900, by the Siegel-Sanders Live Stock Commission Company of Kansas City.

Afterwards, and on the 24th day of November, 1900, the Siegel-Sanders Live Stock Commission Company executed a release of that mortgage and forwarded it to the register of deeds at Ashland, Clark county, Kansas for record.

On the 24th day of October, 1900, the mortgagor in the first mortgage, W. B. Grimes, executed another mortgage upon the same cattle and some more in addition thereto, making in all 633 head of cattle, being identified in the several marks of —— brand on the left hip.

This release to which I have referred was filed for record in the office of the recorder of deeds of Clark county, Kansas on the 27th day of November, 1900. The mortgage to which I have last referred was filed for record in the office of the recorder of deeds of Clark county, Kansas, on the 27th day of October, 1900. The mortgage last referred to secured two promissory notes, due six months after date, or on April 17th, 1901, one of those notes being for $7000 and the other for $7033. and some cents. Afterwards and on the 17th day of April, 1901, Grimes executed a third chattel mortgage to secure two notes due six months after date, or on October 17, 1901. The two notes aggregated a little over $15000.

On the 21st day of May, 1901, we expect to show, the National Live Stock bank received notice from Grimes that some one had taken possession of these steers, and requesting that a good man be sent by the National Live Stock bank at once to Ashland, Kansas. The representative of the National Live Stock bank was sent to Ashland Kansas, and upon arriving there he discovered that the cattle in question had been taken possession of the day or two be-
61 fore by Mr. Young and the representative of the First National Bank of Geneseo. A demand was made upon the

representatives of this bank to surrender the possession of the cattle, which they refused to do, and meanwhile the cattle had been removed from Ashland, Kansas, to this territory and this county. I believe there had been two removals subsequent to the execution of the mortgage under which we claim, and that on the 21st day of May and thereafter, the cattle were in this territory; whereupon a demand was made by the representative of our bank, the National Live Stock bank, for the possession of these cattle which demand was refused, and this suit thereupon was instituted.

The order for delivery called for 606 head of cattle; the return of the sheriff shows that but 374 were recovered. The stipulation which I have called attention to covers the remainder, it being the intent and purpose of both the banks, this contest being between the National Live Stock Bank of Chicago, and the First National Bank of Geneseo, to have whatever dispute there is as to the title, to all of said cattle, settled in this proceeding, and I think that is substantially the facts that we expect to prove.

We understand that, although we have not been officially notified, that the First National Bank of Geneseo, claims that its mortgage is still in existence, that it was either fraudulently released by the mortgage, that is to say, released by the mortgagee subsequent to the assignment of the note secured by the mortgage to it, the First National Bank of Geneseo, or that the signature to the release was a forgery; as to their position of course they are better able to state than I am.

I state this merely by way of recital, in order that the court may understand all of the facts.

Our position is as a matter of law, that we were not bound as
62 subsequent mortgagees, to go beyond the record; that the record showed at and prior to the time that we took this mortgage, that there was no mortgage unreleased of record. I might say by way of history, and it will also come out in the evidence, that the Chicago Cattle Loan Company is a corporation organized under the laws of West Virginia, having its office and principal place of business at Chicago, and that the offices of the Chicago Cattle Loan Company are also the offices of the National Live Stock Bank of Chicago, the plaintiff; that in the month of February, 1901, the Chicago Cattle Loan Company and the plaintiff bank,—the Cattle Loan Company at that time owning the mortgage which we claim was a first mortgage on the cattle sent a representative to Ashland, Kansas, to examine the records, and the records disclosed at that time that there was no unreleased mortgage against the property, and that the mortgage then owned by the Chicago Cattle Loan Company was a first lien upon the property, and that when this mortgage matured, which was in April, 1901, the mortgage under which we now claim was a renewal of that mortgage; a difference in the amount of the mortgage; the cattle company mortgage is on this side of $14000 and some cents, and the present mortgage is for a

little upwards of $15000; being accounted for an addition to the loan on the feeding expenses and interest.

We shall claim and insist that the law of Kansas is well settled and that the decisions are practically all one way upon the proposition that a subsequent chattel mortgagee is not bound to go beyond the record, and that as between two mortgagees both, assuming for the sake of the argument——

By Mr. YOUNG: I would suggest that we argue this matter afterwards.

63 By Mr. STRAWN: I don't want to argue it, I wanted to state the facts, but it is not before the jury. We shall attempt to show, and I think there will be no dispute about it, that both the First National Bank of Geneseo and the National Live Stock Bank of Chicago, took this paper in good faith, and that they both relied upon the fact that they were holding first mortgages. We shall insist that the First National Bank of Geneseo was negligent, and that when one of two innocent parties must suffer, the burden must be borne by the party through whose negligence this suffering has been caused. Our position being that the First National Bank of Geneseo, the mortgage held by it having expired, that is to say, the notes secured by it, having expired November, 1900, there appearing no assignment on the record from the Siegel-Sanders Live Stock Commission Company, the original mortgagee, to the First National Bank of Geneseo, and our client, the National Live Stock Bank of Chicago, never having had any notice that the First National Bank of Geneseo had any title to or any claim in or interest in the property, and as I say, the release of its mortgage appearing of record, that whatever harm has been done the defendant, or whatever financial loss that resulted, must be borne by the First National Bank of Geneseo because it is guilty of negligence. I think that is substantially the facts as we understand them.

By Mr. YOUNG: I would move your honor that from the statement that has been made by the plaintiff's attorney, that we have judgment on his statement.

By the COURT: Well, I should think not.

By Mr. YOUNG: We except. Then, to state our side of the case, it goes over a part of the facts that the plaintiff states. We set out in our answer to their petition in replevin, our chattel mortgage as being prior and superior to their lien, and as being unpaid

64 and unsatisfied, and if there was any satisfaction, it was done without the authority or consent of the First National Bank of Geneseo; that the Siegel-Sanders Live Stock Commission Company had no authority to release the chattel mortgage, and that the chattel mortgage has never been paid. As to the law in the case, I shall beg leave to differ very seriously with the plaintiff.

By the COURT: I assume that would be a reasonable inference.

By Mr. STRAWN: Mr. Young, we hold a mortgage of the same color as yours, I dare say, and I would like to inquire whether or not we can stipulate as to the *bona fides* of the mortgages, that is to

say, whether or not the mortgages comply with the laws of the State of Kansas, and whether they are properly executed, acknowledged and recorded?

By Mr. YOUNG: We will agree to that, that both mortgages are properly executed, according to the laws of Kansas, and properly recorded.

By Mr. STRAWN: Then let the record show that the mortgage held by the National Live Stock Bank of Chicago, being a mortgage bearing date April 17, 1901, securing two promissory notes each for the sum of $7694.77, of even date with the mortgage, payable October 27, 1901, said mortgage being executed by W. B. Grimes Jr. of Clark county Kansas, payable to the Siegel-Sanders Live Stock Company—not payable, but executed by W. B. Grimes Jr. as mortgagor, to the Siegel Sanders Live Stock Commission Company, as mortgagee; that said mortgage was filed for record in the office of the register of deeds of Clark county on the 25th day of April, 1901, and duly recorded in Book 6 at page 123. Said mortgage having been acknowledged by W. B. Grimes, Jr. before M. G. Stevenson, a notary public of Clark county Kansas, on April 19, 1901. Said mortgage bearing
65 $7.25 internal revenue tax stamps duly cancelled. And that the mortgage bearing date June 27, 1900, made by W. B. Grimes, Jr., to the Siegel-Sanders Live Stock Commission Company, on 526 head of cattle, securing one promissory note for $11,111.23, dated June 27, 1900, payable November 1, 1900, said mortgage being acknowledged before M. G. Stevenson, notary public, on July 5, 1900, and filed for record in the office of the register of deeds of Clark county Kansas, on the 12th of July, 1900, and duly recorded in Book 6 Deed Record at page 127 thereof. Said mortgage bearing revenue stamps to the amount $5.25, the $5. stamp attached to said mortgage having been removed; that said stamps were duly canceled; that both of said mortgages were executed, delivered, recorded and in all respects complied with the laws of the State of Kansas at that time in force; that at the date of the execution and delivery of said mortgages and each of them, the cattle mentioned and described in said mortgages and each of them were within Clark county, Kansas, and that W. B. Grimes, Jr., the mortgagor in both of said mortgages, at the date of the execution and delivery of the said mortgages and each of them, was a resident of Clark county Kansas, having his residence at Ashland, in said county.

By the COURT: And the owner of the cattle?

By Mr. STRAWN: And that said Grimes was the owner of the chattels mentioned and described in the said chattel mortgages and both of them at the time of the execution thereof.

By the COURT: Is that last mortgage the one under which the defendant claims?

By Mr. STRAWN: Yes sir.

By the COURT: The first one you read was the one under which you claim?

By Mr. STRAWN: Yes sir.

66 We might also stipulate that the chattel mortgages which have just been identified, and concerning the validity of which there is no controversy, are the same chattel mortgages, true copies of which are attached to the original petition of the petitioner, and to the answer of the defendant, The First National Bank of Geneseo. The amended petition filed herein refers to the copies attached to the original petition, and makes the said copies a part of the amended petition, and the amended answer also refers to the copy of the chattel mortgage attached to the original answer and makes the same a part. There is a little irregularity in the return of the sheriff upon the order of delivery, I assume there is no controversy about that?

By Mr. YOUNG: No sir. Under the stipulation and upon the stipulation of counsel in open court, there is no controversy about the return of the sheriff on the order of delivery, filed in this case.

By Mr. STRAWN: In the copy of the mortgage which is attached to the original petition in this case, the stenographer inadvertently committed to indicate on the copy that the revenue stamps required by law were attached.

I suppose there is no objection to that; if there was, we would simply amend the petition, and there being no objection, we will not amend it. We will assume that the copy of the chattel mortgage attached to the petition is a true and correct copy of the original mortgage. Are you also willing to stipulate that the notes secured by the chattel mortgage, and each of them, are and were either by lapse of time or by declaration on the part of the holders, due and unpaid at the time of this suit?

By Mr. YOUNG: Yes sir.

By Mr. STRAWN: And it is further stipulated in the record

67 that the notes secured by note bearing date June 27, 1900, due November 1, 1900, which is held by the First National Bank of Geneseo, Illinois, for $11,111.23, and which is secured by a chattel mortgage, bearing date June 27, 1900, to which I have referred, was at the date of the commencement of this suit and is now, unpaid and due. It is further stipulated that the two notes——

By Mr. YOUNG: I would like for you to add that the chattel mortgage securing that is still within the limit——

By Mr. STRAWN: It is further stipulated that at the time of the commencement of this suit the chattel mortgage bearing date June 27, 1900, held by the First National Bank of Geneseo, Illinois, was less than one year old, and that according to the laws of the State of Kansas, a chattel mortgage remains a lien upon the property therein described for a period of one year from the date of the filing thereof, in the office of the register of deeds, unless the same shall have been theretofore properly released.

It is also agreed that the two promissory notes each bearing date April 17, 1901, each due October 17, 1901, and each for the principal sum of $7694.77 each being signed by W. B. Grimes, and payable to the order of the Siegel-Sanders Live Stock Commission Company,

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, vs.

were at the date of the commencement of the suit herein and are now, due and unpaid.

It is further stipulated that the note, for $11,111.23, held by the First National Bank of Geneseo, was or has been since on or about the month of July, 1900, held and owned by the First National Bank of Geneseo, as well as the chattel mortgage bearing date June 27, 1900, and that the said note and chattel mortgage have been in the possession of the said First National Bank of Geneseo continuously since the month of July, 1900.

68 It is further stipulated that the two notes bearing date April 17, 1901, and due October 27, 1901, for $7694.77, being the notes secured by the chattel mortgage dated April 17, 1901, and recorded April 25, 1901, were and have been since on or about the 27th day of April, 1901, held and owned by the National Live Stock Bank of Chicago, and that the said chattel mortgage securing said notes has since the said 27th day of April, 1901, been continuously held and owned by said National Live Stock bank, and at the time of the commencement of this suit nothing had been paid on the said notes, or either of them.

It is further stipulated that neither the note owned by the defendant nor the notes owned by the plaintiff have, nor has any part of them been paid.

By the COURT: Somebody got these cattle, didn't they, and applied them?

By Mr. YOUNG: Mr. Strawn got the cattle——

By Mr. STRAWN: But I hav-n't applied them yet.

I suppose it might therefore be considered, and we now offer the chattel mortgage to which I have referred, being the chattel mortgage held and owned by the National Live Stock Bank of Chicago bearing date April 17, 1901, and recorded in Book 6 of the mortgage record of Clark county, Kansas, at page 132, on the 25th day of April 1901, together with the indorsements of the notary public and of the register of deeds thereon, in evidence, and ask that the same be marked Plaintiff's Exhibit No. 1.

(Here the same is marked for the purpose of identification, as Exhibit "A" and offered in evidence, and there being no objection, the same is admitted, and is as follows:)

Know all men by these presents: That W. B. Grimes, Jr.,
69 of the county of Clark, State of Kansas, party of the first part, in consideration of the sum of fifteen thousand three hundred eighty-nine, and 54/100 dollars, paid by Siegel-Sanders Live Stock Commission Company, a corporation, party of the second part, the receipt whereof is hereby acknowledged, have sold, assigned, and delivered, and by these presents does sell, assign and deliver unto said second party all the following articles of personal property situated in the county of Clark and State of Kansas, to wit:

(606) six hundred six head of cattle as follows:

(116) one hundred sixteen head of three year old native steers.

(490) four hundred ninety head of two year old steers, native.
All of the above described cattle are branded thus:
and being all of the cattle of this brand in his possession owned or controlled by him, and being the same cattle bought by bill of sale to parties of the second part, and have been fed all during the winter and are to be grazed during the life of this loan, and now being held in the enclosed and are not to be moved or sold without notice to and the written consent of said second parties.

And being all the property of the above description owned or controlled by the mortgagor now on said premises, and this mortgage is intended to cover and include all of said property of the above description and any addition and increase thereto located on the above described premises and range, if any thereabouts. The marks and brand- used above to describe said property are the holding marks and brands and carry the title, although said property may have other marks and brands.

If the mortgagor should desire to mix any other property with the above, before doing so he shall give a full description of
70 said property intended to be so mixed, with the name of the *the* owner thereof, to said second party, and obtain the written consent of said second party, before mixing the same.

This mortgage also shall cover and include all the right, title and interest, of the mortgagor in and to the pastures, feed pens, feed troughs, and water privileges used in feeding said stock. Said property to remain and be kept on the premises above described until the full payment of the indebtedness hereinafter described, unless sooner marketed or removed by and with the written consent of the mortgagee or its assigns. When marketed, said cattle are to be shipped and consigned for sale to Siegel-Sanders Live Stock Commission Company, at the Kansas City stock yards, and when sold, the proceeds thereof shall be applied first in payment of the usual and customary commissions to said Siegel-Sanders Live Stock Commission Company for selling the same, and the balance, or so much thereof as may be necessary, shall be applied on the indebtedness as hereinafter described. If said cattle or any part thereof, be consigned or sold elsewhere than above, then said mortgagee shall be paid a commission of fifty cents per head on all the above described cattle.

Provided always, and the presents are upon this express condition that if said party of the first part shall pay or cause to be paid unto the said party of the second part the aforesaid sum of fifteen thousand three hundred eighty nine & 54-100 dollars, ($15389.54) according to the terms of two certain promissory notes as follows:

One note for $7694.77 dated April 17th, 1901, payable October 27th, 1901, after date.

One note for $7694.77, dated April 17th, 1901, payable October 27th, 1901, after date.

All payable at the office of said Siegel-Sanders Live Stock Com-
71 mission Company, Kansas City, and all with interest thereon, at the rate of 7 per cent. per annum from maturity, or ac-

cording to the terms of any renewal or extension of said indebtedness which may be made by consent of said second party, its successors or assigns, and may be evidenced by the execution of a new note or notes in place of said original indebtedness at or after maturity, for the amount of the debt then unpaid, and payable hereunder, and for which this mortgage is and shall be a continuing security until paid, whether said debt be evidenced by said original indebtedness above described or any renewals or extensions thereof, and which said indebtedness the party of the first part hereby agrees to pay on the maturity thereof, then, these presents and everything herein contained shall be void, anything herein contained to the contrary notwithstanding. And it is hereby mutually covenanted and agreed between the parties hereto that if default be made in the payment of the said sum of money or any part thereof or the interest thereon, according to the tenor and effect of said indebtedness when the same became due and payable, or upon a failure to conform to or comply with any of the conditions and agreements herein mentioned, then the whole sum of money hereby secured shall, at the option of the party of the second part, or the legal holder or holders of said note or notes, become due and payable at once, without notice.

And it is further agreed that in case of sale or disposal, or attempt to sell or dispose of the goods and chattels hereby mortgaged, or a removal of, or attempt to remove the same from the premises aforesaid, or an unreasonable depreciation in value, or if from any other cause the security shall become inadequate, or the party of the
72 second part shall deem itself insecure at any time before said indebtedness is fully paid, whether the same be due or not, then thenceforth it shall be lawful for the said party of the second part, its successors or assigns, or its authorized agents, to enter upon the premises of the said party of the first part, or any other place or places wherein said goods and chattels or livestock aforesaid may be, to remove and dispose of the same as aforesaid, without resort to law and without appraisement or notice, (all right of redemption, appraisement and notice of foreclosure required by law being hereby expressly waived), and all the equity of redemption of the said party of the first part at public auction or private sale, to the person or persons who shall pay the highest price for the same, and out of the avails thereof to retain the full amount of said obligation, with the interest thereon, according to the conditions thereof, together with all reasonable costs and expenses attending the same and commissions aforesaid, rendering to said party of the first part or his legal representatives, the surplus money, if any there shall be, anything herein to the contrary notwithstanding, and until default be made as aforesaid, or until such time as the said party of the second part shall deem himself insecure as aforesaid, the said party of the first part to continue in the peaceable possession of all of said goods and chattels, all of which in consideration thereof he agrees shall be kept in as good condition as the same now are and taken

care of at his own proper cost and expense, and upon the neglect or failure of said first party so to do, then said second party, its successors or assigns, may cause the same to be done, and for all expenses so incurred, and sum expended, this obligation shall be a continuing security; and if from any cause said property shall fail to satisfy said debt and interest aforesaid, said party of the first
73 part hereby agrees to pay the deficiency.

For the purpose of obtaining the money at this time loaned by the second party and the benefit of future transactions, the first party states that the first party is the absolute owner of all of *all of* the above described property; that the same is free from any incumbrances, and that all the same is now in the possession of said first party at the location.

In witness whereof the party of the first part have hereunto set their hands and seal this 17th day of April, in the year of our Lord, one thousand nine hundred one.

W. B. GRIMES, JR. [SEAL.]

Signed, sealed and delivered in the presence of—
M. G. STEVENSON.

STATE OF KANSAS, } *ss:*
County of Clark, }

Be it remembered, that on the 19th day of April A. D., 1901, before the undersigned, a notary public, duly commissioned and acting as such within and for the county of Clark aforesaid, personally came W. B. Grimes Jr., to me well known to be the grantor described in and who executed and whose name is subscribed to the foregoing instrument of writing as party thereto and stated and acknowledged to me that he executed the same as his free act and deed for the purposes and considerations therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal at my office in Ashland in said county the
74 day and year first above written. My term of office as notary public will expire October 5, 1903.

[SEAL.] M. G. STEVENSON, N. P.

(Officer taking acknowledgement should see that it is in proper form.)

(Endorsed as follows:) No. 1335, 1336. Chattel mortgage. From W. B. Grimes, Jr., Ashland, Kansas, to Siegel-Sanders Live Stock Commission Co. State of Kansas, Clark county, *ss:* This instrument was filed for record on the 25 day of April A. D. 1901, at 8 o'clock a. m. and duly recorded in Book C of M. at page 132. Manford Brown, register of deeds. Fee $0.25 p'd. Siegel-Sanders Live Stock Commission Co. Capital stock $250,000. Live stock exchange, Kansas City, Missouri. Security, steers, 606, $15389.54. Due 10-27-30-1901. Rev. $7.25.

75 By Mr. STRAWN: And we also offer in evidence in connection with the chattel mortgage, the two notes secured thereby, which have been already identified. The two notes are the notes dated April 17th, 1901, for $7694.77 each, and I ask that the same be marked Plaintiff's Exhibits 2 and 3 respectively.

Here the same are marked Exhibits B and C respectively, and there being no objection to the offer, the same are as follows:

No. 32294, Due Oct. 28, 1901.

Siegel-Sanders Live Stock Commission Co.

Capital Stock, $250,000.00.

Rooms 73–74–75, Live Stock Exchange.

KANSAS CITY, Mo., April 17th, 1901.

October 27th, 1901, after date, I we, or either of us promise to pay to the order of Siegel-Sanders Live Stock Commission Company, at their office, seventy-six hundred ninety-four & 77/100 dollars, $7694.77 with interest from maturity at the rate of 7 per cent. per annum until paid.

No. 1336 Due ——.

W. B. GRIMES, JR.

Endorsed: For value received, we hereby assign this note to the National Live Stock Bank of Chicago or order, and waive demand notice and protest of same, and guarantee payment thereof at maturity. Siegel-Sanders Live Stock Commission Co., by R. D. Swain, treas.

The mortgage securing this note is duly stamped according to law.

76 No. 32295, Due Oct. 28, 1901.

The Siegel-Sanders Live Stock Commission Co.

Rooms 73–74–75, Live Stock Exchange.

KANSAS CITY, KANSAS, April 17th, 1901.

October 27th, 1901, after date, I, we, or either of us, promise to pay to the order of Siegel-Sanders Live Stock Commission Co., at their office, seventy six hundred ninety-four & 77-100 dollars, $7694.77 with interest from maturity at the rate of 7 per cent. per annum until paid. Value received.

No. 1335 Due ——.

W. B. GRIMES, JR.

Endorsed: For value received, we hereby assign this note to the National Live Stock Bank of Chicago, or order, and waive demand,

notice and protest of same, and guarantee payment thereof at maturity. The Siegel-Sanders Live Stock Commission Co., by R. D. Swain, treas.

The mortgage securing this note is duly stamped according to law.

By Mr. STRAWN: It is further stipulated between the parties that the cattle described in these chattel mortgages, being the chattel mortgages of the plaintiff and of the defendant, were removed from Clark county Kansas, to Woodward county, Oklahoma, between the 25th of April and the 1st day of May, 1901, without the knowledge or consent of either the First National Bank of Geneseo or the National Live Stock Bank of Chicago or the Siegel-Sanders Live Stock Commission Company, and it is further stipulated that on or about the 19th or 20th day of May, 1901, the First National Bank of Geneseo, by its representatives and agents, demanded from W. B. Grimes, the mortgagor, who was in possession of the cattle, that he turn over to it or to its representatives, the cattle mentioned and described in the *cattle* mortgage held by the said defendant,
77 First National Bank of Geneseo, and bearing date July 12, 1900, recorded in Book 6 of the records in the office of the register of deeds of Clark county, Kansas, at page 127, and that pursuant to such demand the said W. B. Grimes did on the said 19th day or the 20th day of May, 1901, turn over the possession of the cattle mentioned and described in said mortgage, or so much thereof as could be identified, to the said First National Bank of Geneseo, or its representatives and agents.

It is further stipulated and agreed that prior to the commencement of this suit, the National Live Stock Bank of Chicago, by its duly authorized agent in that behalf, demanded from the First National Bank of Geneseo, Illinois, who was in possession of the cattle mentioned and described in both the mortgages of the plaintiff and defendant, that the said First National Bank of Geneseo, Illinois, turn over to the National Live Stock Bank the possession of the cattle therein mentioned and described, it being further stipulated and agreed that the cattle mentioned and described in the chattel mortgage held and owned by the defendant, First National Bank of Geneseo, and by the plaintiff, the National Live Stock Bank of Chicago, are one and the same, and that they are also the same cattle as the ones which were taken in the order of delivery in this suit.

That the First National Bank of Geneseo, prior to the commencement of this suit, refused to surrender the said cattle to the National Live Stock Bank of Chicago, upon the demand so as aforesaid made; that the number of cattle in the mortgage of the First National Bank of Geneseo was 526, and the number in the mortgage owned by the National Live Stock Bank of Chicago is 606, but that the greater number includes the less, and the 526 head of cattle being secured and described in the mortgage held by the First National

Bank of Geneseo, are included in the 606 head described in the mortgage held by The National Live Stock Bank of Chicago, the plaintiff.

It is further stipulated that the mortgagor, W. B. Grimes,
78 Jr., acquired the difference in the number of cattle between the two mortgages, that is to say, the number of eighty head of cattle, between the date of the execution of the mortgage held by the First National Bank of Geneseo, to wit: June 27, 1900, and the date of the execution of the mortgage held by the National Live Stock Bank of Chicago, which was April 17, 1901.

I desire next to have considered in evidence under the stipulation which has been filed here and incorporated in and made part of the record, the following sections of the General Statutes of Kansas, for the Year 1901, by Daster, the verity of these statutes being attested by A. A. Goddard, attorney general, and the secretary of the State of Kansas by their authentication in the beginning thereof.

The sections of this statute to which I refer are as follows: chapter 68, article II, and the section to which I first refer is paragraph 29, section 4244.

By Mr. MARUM: At this time we have no objection to their offering the laws of Kansas for their existence at that time that they took that mortgage, if that law was in existence at that time. It might have been passed by that legislature.

By Mr. STRAWN: This section which I now offer is the General Statutes of 1868, and was in force at the time of the execution of both of these mortgages, and I say now that I shall not offer any statutes which were not in force at the time of the execution and delivery of both of the chattel mortgages in question.

Here the sections offered are read in evidence to the court and are as follows, to wit: See agreement in case made.

79 By Mr. STRAWN: I believe that that section of the statute is set up and referred to by both the plaintiff and defendant in their pleadings. The only difference being in the general number of the statute, the paragraph number and the revision of the statute which I have gives the general number.

There is really no necessity of reading that because it has been admitted that both the mortgages were executed and recorded in accordance with the laws of Kansas.

Perhaps it might save time, that we have considered as offered and admitted, without objection by either party, so much of the chapter 68 of the Law of Kansas relating to mortgages on real and personal property, as may be applicable to this controversy, and so much of said chapter as was in force at the time of the execution and delivery of the chattel mortgages of the plaintiff and defendant or either of them.

By Mr. YOUNG: As I understand your offer, you are offering the entire chapter under mortgages?

By Mr. STRAWN: The reason I do that there are references in the personal property code to the real property code.

By Mr. YOUNG: I desire to object to that portion now, as offering that chapter so far as pertains to real estate.

By Mr. STRAWN: Then it may be admitted from the offer: You may strike out that offer, and the offer is as follows: That article II, of chapter 68 of the Laws of Kansas, being the chapter and article in reference to the mortgaging of personal property, may be considered as offered in evidence by the plaintiff, without objection, and that the court may consider so much thereof as is applicable to this case, and as was in force at the time of the execution and delivery of the chattel mortgages of the plaintiff and defendant or either of them.

These stipulations, if the court please, are made for the
80 purpose of saving time, by reason of the fact that the case is being tried before the court, and I suppose it is immaterial as to the order of proof.

We shall, unless Mr. Young objects to the order of proof, desire to offer in evidence the satisfaction of the mortgage which was held and owned by the First National Bank of Geneseo, and in that connection I desire to offer and read to the court, first the deposition of Manford Brown, the register of deeds of Clark county, Kansas.

By Mr. YOUNG: I desire to object to the offering of this release, for the reason that the release is not a properly executed instrument, and for the further reason that it is incompetent, irrelevant and immaterial, and that the same is not binding in any way upon this defendant, and my further objection is that there is no testimony in relation to the release.

By Mr. STRAWN: My answer to that objection is first that we expect to show that the release which we offer is executed in accordance with the usual laws and customs of Kansas in such matters, and second, that the release is competent and material.

By Mr. MARUM: They have attempted in their answer—they have admitted in their answer,—they deny that at the end and set up a statement of payment; in the stipulation just entered into, he admits that none of the notes were paid. He admits that we had purchased this note prior to that time and prior to this cancellation by the outside party; we think your honor before that could be competent, I think you would have to show that whoever signed this release were our agents and representatives.

By Mr. STRAWN: Our position is, as I stated at the outset, that the law of Kansas and the laws of other States by the overwhelming weight of authority,—in other words from the United States
Supreme Court down,—that an assignee of a chattel or real
81 estate mortgage, who fails or neglects to record his assignment, is not protected against the rights of innocent purchasers or subsequent mortgagees without notice. We expect to show that at the time of this chattel mortgage under which we claim title to these cattle *were* executed and delivered and purchased by us, that this release was executed and of record, and that we had no

notice either from the record or otherwise that any body, the First National Bank of Geneseo or any body else, had a lien upon those cattle. We take the position that it is wholly immaterial whether or not the First National Bank of Geneseo had or had not authorized the execution and delivery of this release. We expect to show that the release was a *bona fide* release, executed in accordance with the laws of Kansas, and by the mortgagee mentioned and described in that mortgage, and that that release was filed for record in the office of the recorder of deeds of Clark county, Kansas, wherein the mortgage was originally filed, and that it so remained of record for a long time prior to the execution and delivery of our note and mortgage and prior to the time that we purchased it, and as to the authorities upon that proposition, if the court desires to hear from me now, I shall be pleased to cite some authorities.

By the COURT: If that is not the controlling question in the case, I would not want to stop and determine it now—If it is——

By Mr. YOUNG: That is the question in the case right here.

By Mr. STRAWN: In order that the court might have before him all of the facts relative to the execution and delivery — this release and of the question of the diligence between the parties, that is to say, between the First National Bank of Geneseo and the National Live Stock Bank of Chicago, I think it will be proper to read some depositions and evidence which we have upon that subject. I would like to read the evidence of Mr. Brown, and would like to introduce Mr. W. B. Grimes, and would like to introduce Mr. C. H.
82 True, and witnesses on the other questions. If the court would like to hear the law on the subject before I introduce that evidence, and then if the court holds that the evidence is inadmissable,——

By the COURT: Is there much evidence outside of this?

Mr. STRAWN: There is not much, I think that is substantially the question in the case as near as I can diagnose it.

By Mr. YOUNG: This evidence you are speaking of following this, simply follows what relates to this release that is filed of record over there after our mortgage was executed. Of course, we object to it as being incompetent, irrelevant and immaterial and not binding upon us.

By Mr. STRAWN: In so far as the other evidence is concerned, in answer to the question by the court, I take it that the question as to whether or not this release is binding upon the First National Bank of Geneseo, is the main question in this case.

By the COURT: I will let the evidence go in and determine it on the final determination.

By Mr. YOUNG: To which we except.

Here the plaintiff reads in evidence the deposition of Manford Brown and the same is as follows, to wit:

MANFORD BROWN, register of deeds of Clark county Kansas, called as a witness on behalf of the plaintiff, being by me first duly examined, cautioned and solemnly sworn to testify the truth, deposes and says:

83 Direct examination by EARL W. EVANS:

Q. State your name and place of residence.
A. Manford Brown, Ashland Kansas.
Q. What, if any, official position do you hold in Clark county, Kansas?
A. Register of deeds.
Q. How long have you held that position?
A. Since the 8th day of January, 1900.
Q. What are the duties of the register of deeds, that you have to perform in Ashland, Clark county, Kansas?
A. What are the duties?
Q. Yes.
A. Recording all instruments that are placed upon record in the register of deeds office.
Q. Both real property and chattel property?
A. Both real property and chattel property.
Q. What, if any records do you keep of instruments which relate to personal or chattel?
A. Keep the regular set of chattel mortgage records.
Q. Upon a chattel mortgage being filed in your office, what do you do?
A. We place the date of the filing on the back of it and the time of its reception and then record it in the chattel mortgage record.
Q. Look at the instrument I now hand you, marked Exhibit "A"
A. Yes sir, I recognize the instrument.
Q. Did you ever see that instrument before?
A. Yes sir.
Q. When?
A. It first come in my possession July 12, 1900
Q. When did you say you first saw that?
84 A. First come in my possession July 12, 1900.
Q. What did you do with — when it come into your possession?
A. I filed it for record.
Q. And marked it filed on the back?
A. Yes sir.
Q. And signed your name?
A. Signed my name to it.
Q. Then what did you do with it?
A. Placed it on record, and then recorded it in its turn with the rest of the instruments.

The plaintiff now offers in evidence Exhibit "A," and asks that it be attached to this witness'es testimony as a part thereof.

By Mr. YOUNG: No objection.

And in accordance with the above, Exhibit "A" is by me the undersigned notary public, hereby attached to this witness's deposition and made a part thereof.

M. C. MAYSE,
Notary Public.

Here the same is as follows:

Know all men by these presents, that W. B. Grimes Jr., of the county of Clark, State of Kansas, party of the first party, in consideration of the sum of eleven thousand, one hundred eleven & 23 / 100 dollars, paid by Siegel-Sanders Live Stock Commission Company, a corporation, party of the second part, the receipt whereof is hereby acknowledged, have sold assigned and delivered and by these presents does sell, assign and deliver unto said second party, all the following article- of personal property, situated in the county of Clark, and State of Kansas, to wit:

(526) five hundred twenty-six head of cattle as follows:

(443) four hundred forty-three head of native full aged one year old steers.

(83) eighty three head of native full age two year old
85 steers. All of the above cattle branded thus:

Being all the cattle owned by me in this brand, and being the same cattle now being held and grazed by themselves in my enclosed pasture located near Ashland, in Clark county, Kansas where they are to be held and not to be moved or sold without notice to and the written consent of said second parties.

And being all the property of the above description owned or controlled by the mortgagor now on said premises, and this mortgage is intended to cover and include all of said property of the above description and any addition and increase thereto located on the above described premises and range, if any thereabouts. The marks and brands used above to describe said property are the holding marks and brands and carry the title, although said property may have other marks and brands. If the mortgagor should desire to mix any other property with the above, before doing so, he shall give a full description of said property intended to be so mixed, with the name of the owner thereof, to said second party and obtain the written consent of said second party before mixing the same. This mortgage shall also cover and include all the right, title and interest of the mortgagor in and to the pasturage, feed pens, feed troughs and water privileges used in feeding said live stock. Said property to remain and be kept on the premises above described until the full payment of the indebtedness hereinafter described, unless sooner marketed or removed by and with the written consent of the mortgagee or its assigns. When marketed said cattle are to be shipped and consigned for sale to Siegel-Sanders Live Stock Commission Company, at the Kansas City stock yards, and when sold the proceeds thereof shall be applied first in payment of the

usual and customary commissions to said Siegel-Sanders Live Stock Commission Company for selling the same, and the balance,
86 or so much thereof as may be necessary, shall be applied on the indebtedness hereinafter described. If said cattle or any part thereof be consigned or sold elsewhere than above, then said mortgagee shall be paid a commission of 50 cents per head on all the above described cattle.

Provided always, and these presents are upon this express condition that if said party of the first part shall pay or cause to be paid unto the said party of the second part, the aforesaid sum of eleven thousand, one hundred eleven & 23/100 dollars ($11111.23) according to the terms of one certain promissory note as follows:

One note for $11111.23 dated June 27th, 1900 payable November 1st, 1900 after date.

All payable at the office of said Seigel-Sanders Live Stock Commission Company, Kansas City, and all with interest thereon at the rate of 8 per cent. per annum from maturity or according to the terms of any renewal or extension of said indebtedness which may be made by consent of said second party, its successor or assigns, and may be evidenced by the execution of a new note or notes in place of said original indebtedness at or after maturity, for the amount of the debt then unpaid and payable hereunder, and for which this mortgage is and shall be a continuing security until paid, whether said debt be evidenced by said original indebtedness above described or any renewals or extensions thereof, and which said indebtedness the party of the first part hereby agree to pay on the maturity thereof, then these presents and everything herein contained shall be void, anything herein contained to the contrary notwithstanding. And it is hereby mutually covenanted and agreed between the parties hereto, that if default be made in the payment of said sum of money, or any part thereof, or the interest thereon, according to the tenor and effect of said indebtedness, when the
87 same became due and payable, or upon a failure to conform to or comply with any of the conditions and agreements herein mentioned, then the whole sum of money hereby secured shall at the option of the party of the second part, or the legal holder or holders of said note or notes, become due and payable at once, without notice. And it is further agreed that in case of sale or disposal or attempt to sell or dispose of the goods and chattels hereby mortgaged or a removal of, or attempt to remove the same from the premises aforesaid, or an unreasonable depreciation in value, or if from any other cause the security shall become inadequate, or the party of the second part shall deem itself insecure at any time before said indebtedness is fully paid, whether the same be due or not, then and thenceforth it shall be lawful for the said party of the second part, its successors or assigns or its authorized agent, to enter upon the premises of the said party of the first part, or any other place or places wherein said goods and chattels or live stock aforesaid may be, to remove and dispose of the same as afore-

said without resort to law, and without appraisement or notice (all right of redemption, appraisement and notice of foreclosure required by law being hereby expressly waived), and all the equity of the said party of the first part, at public auction or private sale, to the person or persons who shall pay the highest price for the same, and out of the avails thereof to retain the full amount of said obligation, with the interest thereon, according to the conditions thereof, together with all reasonable costs and expenses attending the same and commissions aforesaid, rendering to said party of the first part, or his legal representatives, the surplus money, if any there shall be, anything herein to the contrary notwithstanding. And until default be made as aforesaid, or until such time as the said party of the second part shall deem itself insecure as aforesaid, the
88 said party of the first part to continue in the peaceable possession of all said goods and chattels, all of which in consideration thereof, he agrees, shall be kept in as good condition as the same now are, and taken care of at his own proper cost and expense, and upon the neglect or failure of said first party so to do, then said second party, its successors or assigns, *may* cause the same to be done, and for all expenses so incurred and sums expended, this obligation shall be a continuing security; and if from any cause said property shall fail to satisfy said debt and interest aforesaid, said party of the first part hereby agree- to pay the deficiency.

For the purpose of obtaining the money at this time loaned by the second party and the benefit of future transactions, the first party states that the first party is the absolute owner of all of the above described property; that the same is free from any incumbrances, and that all of the same is now in the possession of said first party at the location.

In witness whereof, the party of the first part have hereunto set *their* hand and seal this 27th day of June in the year of our Lord one thousand nine hundred.

W. B. GRIMES, JR. [SEAL.]

Signed, sealed and delivered in the presence of
M. G. STEVENSON.

STATE OF KANSAS, } ss:
County of Clark, }

Be it remembered, that on this fifth day of July A. D., 1900, before the undersigned a notary public duly commissioned and acting as such within and for the county of Clark, aforesaid, personally came W. B. Grimes, Jr., to me well known to be the grantor described in and who executed and whose name is subscribed to the foregoing instrument of writing as party thereto, and stated
89 and acknowledged to me that he executed the same as his free act and deed for the purposes and considerations therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in Ashland, in said county, the day and year first above written.

My term of office as notary public will expire October 5, 1904.

[SEAL.] M. G. STEVENSON,
Notary Public.

(Officer taking acknowledgement should see that it is — proper form.)

Endorsed: Copy released 27 Nov. 1900 No. 604. Chattel mortgage. From W. B. Grimes Jr., Clark Co. Kas. to Siegel-Sanders Live Stock Commission Company.

90 STATE OF KANSAS, } ss:
Clark County, }

This instrument was filed for record on the 12 day of July A. D. 1900 at 8 o'clock a. m. and duly recorded in Book 6 of M. at page 127.

MANFRED BROWN,
Register of Deeds.

Fee, $.25

Siegel-Sanders Live Stock Commission Co.

Capital Stock, $250,000.00.

Live Stock Exchange, Kansas City, Mo.

Due ——.

Security: Steers 526. Cow- — Heifers — Calves — Bulls — $11111.23 Due 11-4-1900.

Rev. $5.25. Revenue stamp to the amount of $5.25 on this instrument and canceled.

Q. You say you upon receiving this you made a notation of it upon your reception record?
A. Yes sir.
Q. Have you that reception record with you?
A. Not the reception record, the chattel mortgage record.

Witness thereupon produced for examination the reception record referred to.

Q. Then you say that after that you entered it in your chattel mortgage record?
A. Entered it in the chattel mortgage record.
Q. Have you that chattel mortgage record with you?
A. Yes sir.

91 Q. Please hand it to the notary public and ask him to attach it to your deposition as a part thereof.

Which the witness refuses to do.

Q. Will you turn in your chattel mortgage record to the record of the chattel mortgage which has just been referred —?

A. That is it on page 127, No. k 6, page 127, chattel mortgage record.

Q. Do you still refuse to allow this record or the page thereof upon which this record is made to be attached to this deposition as a part thereof?

A. I do.

Q. Look at the paper marked Exhibit B and state if you know what it is?

By Mr. YOUNG: I object to the introduction of Exhibit B, the portion of Exhibit B, namely, the writing on Exhibit B in red ink purporting to be a release of said mortgage, filed July 12, 1900, for the reason that the same is incomplete, irrelevant and immaterial.

By Mr. MARUM: We object to it at this time also.

By Mr. EVANS: That is just a copy of the record of the chattel mortgage under which the defendant claim-.

By the COURT: They raised that same question as to offering the release itself, I presume; let it go in.

To which the defendant except-.

EXHIBIT B.

A Copy.

Book No. 6, Chattel Mortgages, Clark County, Kansas. 127.

Time of reception, June 30th, 1900. Name of mortgagor, Grimes. B. R. Name of mortgagee, Siegel-Sanders Live Stock Commission Co. Date of instrument, June 13, 1900, Amount secured, $4509.50. When due January 13, 1901, Property mortgaged (231) two

92 hundred thirty one head of cattle as follows:

(95) ninety-five head of western cows, three to seven years old, branded thus:

(96) ninety-six head of western cows, three to seven years old, branded thus:

(20) twenty head of three year old cows, branded thus:

(20) twenty head of three year old steers, branded thus:

This mortgage includes all calves at side of above cows, and any and all future increase above cattle are now located on the ranch of the said B. R. Grimes, ten miles south of Ashland, Kansas, there to be held grazed and fed.

Remarks.—(In red ink:) Released by order of the Siegel-Sanders L. S. Com. Co. Filed 29 day of January, 1901. Signed by R. D. Swain, Recv.

Rev. stamp to the amount of $2.00 on this instrument and cancelled.

(Second entry on said page marked Exhibit B is as follows:)
Time of reception, July 12, 1900; name of mortgagor, Grimes W. B. Jr., Name of mortgagee, Siegel-Sanders Live Stock Commission Company, Date of instrument, June 27, 1900, Amount secured, $11111.23. When due, November 1st, 1900. Property mortgaged (526) five hundred twenty six head of cattle as follows:
(443) four hundred forty-three head of native full aged one year old steers, eighty-three head of native full age two year old steers, all of the above cattle branded thus:
Being all the cattle owned by me in this brand and being the same cattle now being held and grazed by themselves in enclosed pasture located near Ashland, in Clark county, Kansas, where they are to be held, and are not to be moved or sold without notice to and the written consent of said second party.

93 Remarks.—(In red ink:) Released by order of the Siegel-Sanders Live Stock Com. Co. 24 day of Nov. 1900 by Frank Siegel, pres. Filed this 27 day of November, 1900. Manford Brown, register of deeds. (In black ink:) Renewal affidavit filed on the 20th day of June, 1900 dated 17 day of June, 1901, by S. T. Hume Pt. First National Bank of Geneseo, Ills., for 11111.23 and interest at 10 per cent. Witness, Manford Brown, R. of deeds.

(Rev. stamp to the amount of $5.25 on this instrument and cancelled.)

(Third entry on said page offered as exhibit is as follows:)
Time of reception, July 18, 1900; name of mortgagor, Grimes W. B. Jr., name of mortgagee, Siegel-Sanders Live Stock Commission. Rev. stamp to the amount of $5.75 on this instrument and cancelled. Date of instrument, June 10, 1900, amount secured, 12116.73. When due, 6 months after date. Property mortgaged (765) seven hundred sixty five head of cattle as follows:
(363) three hundred sixty three head of well bred western cows.
(250) two hundred fifty calves and increase from above cows,
(67) sixty seven head of well bred two year old western steers,
(18) eighteen head of well bred one year old native steers,
(17) seventeen head of one year old well bred native heifers.
(50) fifty head of high grade Her-ford bulls, four years old.
All of above cattle are branded 4 T on left hip and are all the cattle of above brand owned by him, and all now being held and grazed on what is known as the Wilson farm, eight miles east of Ashland, in Clark county, Kansas, and are there to be held. Above cows being bred to graded Her-ford bulls, this mortgage includes *and* all increase in same.

Remarks.—(In red ink:) Released by order of the Siegel-Sanders Live S. Com. Co. Dated 16 day of January, 1901, signed by R. D. Swain, treas., filed the 18 day of January, 1901, Manford Brown, reg. of deeds.

94 (Fourth Entry on Exhibit B.)

Time of reception, Oct. 15, 1900. Name of mortgagor, Grimes, W. B. Jr. Name of mortgagee, Siegel-Sanders Live Stock Commission Co. Rev. stamp to the amount of $4.23 on this instrument and cancelled. Date of instrument, Oct. 10, 1900. Amount secured, 9025.75. When due, six months after date; property mortgaged (390) three hundred ninety head of well bred Pan Handle cows, four to seven years old; six (6) head of high grade Her-ford and Durham bulls. Three (3) head of two year old steers; all of the above cattle branded on right side, and being same cattle bought from W. M. Edlin, and J. H. Nation as evidenced by a bill of sale dated October 6th, 1900; said cattle were counted out and rebranded on right hip and being all the cattle of this brand in his possession now or controlled by him. The above cattle being bred to graded Her-ford and Durham bulls this mortgage includes any and all increases to same.

The above cattle are to be held and fed all during the winter and are not to be moved or sold without notice to and written consent of parties of the second part.

Register's Certificate.

STATE OF KANSAS, } ss:
Clark County, }

I, Manfred Brown, register of deeds in and for said county do hereby certify that the annexed and foregoing is a full, true and complete copy of the chattel mortgage record number six page 127, showing complete record of all chattel mortgages there recorded, as the same appears of record, and was recorded in Chattel Record vol. 6, page 127, of the records of the register of deeds' office of Clark county, in the State of Kansas, from June 30th, 1900 to *on the* October 15th, 1900, which record is now in my custody as
95 register of deeds.

In witness whereof I hereunto set my hand and the seal of said office this 4th day of April, 1902.

MANFRED BROWN,
[SEAL.] Register of Deeds of Clark County, Kansas.

Q. This chattel mortgage record which you have produced is the regular chattel mortgage record which you as register of deeds of Clark county Kansas, have in your possession and have kept for the recording of instruments relating to personal property in your county, is it not?

A. It is.

Q. Is it the only record for the time covered by it of such transactions?

A. In that letter, yes, in that letter in that book. We have got other books.

Q. You haven't any other chattel mortgage record for keeping a record of the chattel mortgage referred to, have you?

A. I have not no other.

Q. And this is the record you have officially kept of that chattel mortgage, is it?

A. It is.

Q. I now hand you the instrument marked Exhibit A, and ask you to examine it and state if you know what it is.

A. It is a copy of the chattel mortgage number 6, page 127.

Q. You made this copy, did you?

A. Yes sir, I made that copy.

Q. This is a copy, is it, of the page of the record which you produced which contains the record of the chattel mortgage referred to?

96 A. It does.

By Mr. EVANS: Plaintiff now offers Exhibit "B" in evidence.

By Mr. YOUNG: Defendant objects to that, all that portion of Exhibit "B" in red ink purporting to be a release of said chattel mortgage, for the reason that it is incompetent, irrelevant and immaterial. And we make the further objection at this time that it is not binding on the defendant——

Upon which objection the court did not at the time rule.

By Mr. EVANS: Look at the instrument which I now hand you, marked Exhibit "C," and state if you have ever seen that before.

By Mr. YOUNG: We object to any testimony concerning Exhibit "C" for the reason that the same is incompetent, irrelevant and immaterial.

By Mr. YOUNG: And further not binding on the defendant, the signature is not shown to be genuine, is not properly executed, is not acknowledged and is not witnessed——

By Mr. MARUM: This is a corporation, and there has been no evidence introduced here showing the organization of the corporation or an election of officers or that Frank Siegel or anybody else were authorized to grant such a release, even if it was a corporation.

By Mr. EVANS: The corporation seal is attached.

By the COURT: Does it purport to be signed by the officers of the corporation?

By Mr. EVANS: It purports to be signed by the Siegel-Sanders Live Stock Commission Company, by Frank Siegel P't with the corporate seal attached.

By the COURT: That is a corporation in another State?

By Mr. EVANS: Yes sir.

By the COURT: What State?

By Mr. EVANS: Missouri.

97 By the COURT: Don't you allege it was West Virginia?

By Mr. EVANS: No sir, not that one. Shall I read it in evidence and then have all of the argument?

By Mr. YOUNG: I will make the further objection to the body of the release, for the reason that it is indefinite, failing to describe the mortgage in controversy or sought to be released, and for the reason that it is not acknowledged before a notary public and not witnessed.

By Mr. EVANS: As to that, I will say that this release recites the number of the chattel mortgage, which corresponds to the copy of the mortgage of the defendants which has been introduced in evidence—deed of trust or chattel mortgage No. 604, covering 526 head of steers branded —— on left hip, given by W. B. Grimes, Jr., to secure the payment of $11111.23 which said deed of trust or mortgage was dated 6–27–1900, and recorded in the office of the register of deeds of Clark county, Kansas.

By the COURT: That is sufficiently identified. I am not sure but that the objection made by Mr. Marum is well taken, that unless there was a showing made that the board of directors had authorized him to satisfy that mortgage or the law of Missouri authorized the president to perform such acts by virtue of his office.

By Mr. EVANS: Does the court care to hear us on that now or wait until the other questions come up and argue them all at once?

By the COURT: That is a matter of proof and not argument.

By Mr. EVANS: The question of argument as to the right of him to do that, of the president executing a release of a chattel mortgage without any specific showing that the board of directors authorized it?

By the COURT: What I mean by saying it was a question of proof of course, that it was authorized by the board of directors, it would have to be shown by their proceedings, and if it was a mat-

98 ter authorized by the law of Missouri, it would have to be proven.

By Mr. EVANS: Our position is that it is not necessary to make that proof, and we believe that the showing which we shall make and the authorities we have to submit, the court will agree that it is not necessary to make any further showing as to his authority to make this release.

By the COURT: Reserve the question and go on.

Here the same is read in evidence to the court, and is as follows to-wit:

(Copy.)

Release of Mortgage.

In consideration of the payment of the debt secured thereby, we the Siegel-Sanders Live Stock Commission Company, of Kansas City, Missouri, do hereby release, cancel and finally discharge the deed of trust or mortgage No. 604, covering 526 head of steers, branded

—— left thigh, given by W. B. Grimes Jr., to secure the payment of eleven thousand one hundred eleven & 23-100 dollars, which said deeds of trust or mortgage was dated 6-27-1900 and recorded in the office of the recorder of deeds of Clark county, State of Kansas, in Book —, at page —.

Witness the seal and signature of this company this 24th day of November, A. D., 1900.

SIEGEL-SANDERS LIVE STOCK COMMISSION COMPANY.
FRANK SIEGEL, P't. [SEAL.]

STATE OF ——, } ss:
County of ——, }

On this — day of —— A. D. 190-, before the undersigned —— ——, a notary public of said county, personally appeared
99 —— —— who is personally known to me to be the same person who executed the foregoing release, and duly acknowledged that he executed the same as his free act and deed.

Witness my hand and notorial seal the date last aforesaid.

—— ——.
Notary Public

My commission expires —— A. D., 190-.
Released 27 day of Nov. 1900.

Q. Ever see it before?
A. I have.
Q. When did you first see it?
A. 27th day of November, 1900.
Q. From whom did you receive it, if any one?
A. To the best of my knowledge, it came in a letter from Frank Siegel.
Q. Where is the letter which accompanied it?
A. The letter has been lost, I don't know where it is now; I didn't take any care of it.
Q. What if any search have you made for it, and what, if any, effort have you put forth to get it?
A. I have looked through all the files and can't find it.
Q. The files and places where you usually and habitually keep papers and letters of that character?
A. Yes.
Q. Didn't you find it?
A. Didn't find it.
Q. What did you do when you received this paper marked Exhibit "C"?
A. I recorded it on the original, on the record of the original instrument, as required by law.
Q. And then what did you do with it?

A. Then placed it here in the office, attached to the original the release of the mortgage.

100 Q. Have you ever seen the signature of Frank Siegel?

A. Yes I have seen his signature a good many times, his releases.

Q. During your term as register of deeds, have you had occasion to receive letters signed by Frank Siegel, or any other papers or documents signed by him?

A. I have.

Q. Are you familiar with his handwriting and his signature?

A. Yes sir, I am familiar with it.

Q. State if you know whose—in whose handwriting the signature "P't"—in whose handwriting the words "Frank Siegel, P't," at the bottom of Exhibit "C" is in?

A. I think it is in Frank Siegel's.

By Mr. EVANS: Plaintiff now offers in evidence as a part of this witness's testimony "Exhibit C."

By Mr. YOUNG: Defendant objects to the introduction of Exhibit "C" for the reason that the signature has not been shown to be genuine and is not properly executed and is not acknowledged, is not witnessed, and is incompetent, irrelevant and immaterial.

Accordingly Exhibit "C" is by me, the undersigned notary public hereby attached to this witnesse's testimony as a part thereof.

H. C. MAYSE.

By Mr. EVANS: Plaintiff again offers in evidence Exhibit "C," identified by this witness.

By Mr. YOUNG: To which offer of Exhibit "B" the defendant objects to all that portion of said Exhibit "B" written in red ink.

Accordingly the paper marked Exhibit "B" is by me, the undersigned notary public, hereby attached to this witness's testimony as a part thereof.

H. C. MAYSE.

Q. Then as I understand you, Mr. Brown, upon receiving the paper marked Exhibit "C," you made the entry in your chat-

101 tel mortgage record in red ink to the effect that the chattel mortgage had been released? Is that right?

A. Yes sir, that is the usual way of doing it in all books, writing in red ink to denote them easily from other instruments on the books.

Q. Look at the instrument I now hand you, Mr. Brown, and state if you ever have seen it before?

A. Yes sir.

Q. When did you first see it?

A. 25th day of April 1901.

Q. Is that a part of the record in your office at this time?

A. It is.

Q. Will you please hand that to the notary public taking your deposition and ask him to attach it to your deposition as a part thereof?

A. You mean let this go out, I can't let this go out, no sir.

Q. Will you look at the paper I now hand you, marked Exhibit "D," and state if you know what it is?

A. This is a copy of the original filed on the 25th day of April, 1901.

Q. You mean that is a copy of the instrument I just spoke to you about, and that you refused to let go?

A. That is a copy of it, yes sir.

By Mr. EVANS: Now offer in evidence Exhibit "D." There being no objection at the time of taking the deposition or at the trial, the same is as follows:

Know all men by these presents, that W. B. Grimes, Jr., of the county of Clark, State of Kansas, party of the first part, in consideration of the sum of fifteen thousand three hundred eighty nine & 54-100 dollars, paid by Siegel-Sanders Live Stock Commission
102 Company, a corporation, party of the second part, the receipt whereof, is hereby acknowledged, *have* sold, assigned and delivered, and by these presents does sell, assign and deliver, unto said second party all the following articles of personal property situated in the county of Clark and State of Kansas, to wit:

(606) six hundred six head of cattle as follows:

(116) one hundred sixteen head of three year old native steers;

(490) four hundred ninety head of two year old steers, native.

All of the above described cattle branded thus:

And being all the cattle of this brand in his possession, owned or controlled by him and being the same cattle bought by bill of sale to partys of the second part, and have been fed all during the winter and are to be grazed during the life of this loan, and now being held in the enclosed pasture and are not to be moved or sold without notice to and written consent of said second parties. And being all the property of the above description owned or controlled by the mortgagor on said premises, and this mortgage is intended to cover and include all of said property of the above description, and any addition and increase thereto located on the above described premises and range, if any thereabouts. The marks and brands used above to describe said property are the holding marks and brands, and carry the title although said property may have other marks and brands. If the mortgagor should desire to mix any other property with the above, before doing so, he shall give a full description of said property intended to be so mixed, with the name of the owner thereof, to said second party, and obtain the written consent of said second party before mixing the same. This mortgage shall also cover and include all the right, title and interest of the mortgagor in and to the pasturage, feed pens, and

water privileges used in feeding said live stock. Said prop-
103 erty to remain and be kept on the premises above described until the full payment of the indebtedness hereinafter described, unless sooner marketed or removed, by and with the written consent of the mortgagee or its assigns. When marketed, said cattle are to be shipped and consigned for sale to Siegel-Sanders Live Stock Commission Company, at the Kansas City stock yards, and when sold, the proceeds thereof, shall be applied first in payment of the usual and customary commissions to said Siegel-Sanders Live Stock Commission Company for selling the same, and the balance or so much thereof as may be necessary, shall be applied on the indebtedness hereinafter described. If said cattle, or any part thereof be consigned or sold elsewhere than above, then said mortgagee shall be paid a commission of 50 cents per head on all of the above described cattle.

Provided always, and these presents are upon this express condition, that if said party of the first part shall pay or cause to be paid unto the said party of the second part, the aforesaid sum of fifteen thousand three hundred eighty nine & 54-100 dollars ($15389.54), according to the terms of two certain promissory notes as follows:

One note for $7694.77 dated April 17th, 1901, payable October 27th, 1901, after date.

One note for $7694.77 dated April 17th, 1901, payable October 27th, 1901, after date.

All payable at the office of said Siegel-Sanders Live Stock Commission Company, Kansas City and all with interest thereon, at the rate of seven per cent. per annum from maturity or according to the terms of any renewal or extension of said indebtedness, which may be made by consent of said second party, its successors or assigns,
and may be evidenced by the execution of a new note or
104 notes in place of said original indebtedness at or after maturity for the amount of the debt then unpaid, and payable hereunder, and for which this mortgage is and shall be a continuing security until paid, whether said debt be evidenced by said original indebtedness above described or any renewals or extensions thereof, and which said indebtedness the party of the first part hereby agrees to pay on the maturity thereof. Then these presents and everything herein contained shall be void, anything herein contained to the contrary notwithstanding, and it is hereby mutually covenanted and agreed between the parties hereto, that if default be made in the payment of said sum of money or any part thereof, or the interest thereon, according to the tenor and effect of said indebtedness when the same became due and payable, or upon a failure to conform to or comply with any of the conditions and agreements herein mentioned then the whole sum of money hereby secured shall at the option of the party of the second part or the legal holder or holders of said note or notes become due and payable at once without notice.

And it is further agreed that in case of sale or disposal or attempt

to sell or dispose of the goods and chattels hereby mortgaged or a removal of or attempt to remove the same from the premises aforesaid, or an unreasonable depreciation in value, or if from any cause the security shall become inadequate, or the party of the second part shall deem itself insecure at any time before said indebtedness is fully paid, whether the same be due or not, then and thenceforth it shall be lawful for the said party of the second part, its suc-essors or assigns, or its authorized agent, to enter upon the premises of the said party of the first part, or any other place or places wherein said goods and chattels or livestock aforesaid may be, to remove and dispose of the same
105 as aforesaid without resort to law, and without appraisement or notice, (all right of redemption, appraisement and notice of foreclosure required by law being hereby expressly waived) and all the equity of redemption of the said party of the first part at public auction or private sale, to the person or persons who shall pay the highest price for the same, and out of the avails thereof to retain the full amount of said obligation with the interest thereon, according to the conditions thereof, together with all reasonable costs and expenses attending the same, and commissions aforesaid, rendering to said party of the first part, or his legal representatives the surplus money, if any there shall be; anything herein to the contrary notwithstanding. And until default be made as aforesaid, or until such time as said party of the second part shall deem itself insecure as aforesaid, the said party of the first part to continue in the peaceable possession of all said goods and chattels, all of which, in consideration thereof, he agrees shall be kept in as good condition as the same now are, and taken care of at his own proper cost and expense. And upon the neglect or failure of said first party so to do, then said second party, its successors or assigns, may cause the same to be done and for all expenses so incurred and sums expended, this obligation shall be a continuing security; and if from any cause said property shall fail to satisfy said debt and interest aforesaid, said party of the first part hereby agree- to pay the deficiency.

For the purpose of obtaining the money at this time loaned by the second party and the benefit of future transactions the first party states that the first party is the absolute owner of the above described property; that the same is free from any incumbrances and that all the same is now in the possession of said first party at the
106 location.

In witness whereof, the party of the first part *has* hereunto set *their* hands and seal this 17th day of April, in the year of our Lord one thousand nine hundred one.

W. B. GRIMES, JR. [SEAL.]

Signed, sealed, and delivered in the presence of

M. G. STEVENSON.

STATE OF KANSAS, } ss:
County of Clark, }

Be it remembered that on this 19th day of April, A. D., 1901, before the undersigned, a notary public, duly commissioned and acting as such within the county of Clark aforesaid, personally came W. B. Grimes, Jr., to me well known to be the grantor described in, and who executed and whose name is subscribed to the foregoing instrument of writing as a party thereto, and stated and acknowledged to me that he executed the same as his free act and deed for the purposes and considerations therein mentioned:

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in Ashland, in said county, the day and year first above written. My term of office as notary public will expire October 5, 1903.

[SEAL.] M. G. STEVENSON, N. P.

(Officer taking acknowledgment should see that it is in proper form.)

107 (Endorsed as follows:) Copy. No. 1335–1336 Chattel mortgage. From W. B. Grimes, Jr., Ashland Kansas, to Siegel Sanders Live Stock Commission Co.

STATE OF KANSAS, } ss:
County of Clark, }

This instrument was filed for record on the 25 day of April A. D. 1901, at 8 o'clock a. m. and duly recorded in Book 6, of M. at page 132.

MANFRED BROWN,
Register of Deeds.

Fee, $0.25 pd.

Siegel-Sanders Live Stock Commission Company. Capital Stock, $250,000. Live Stock Exchange, Kansas City, Missouri.

Security:
Steers, 606.
Cows, —.
Heifers, —.
Calves, —.
Bulls, —.
Amount $15389.54 · Due 10–27–30–1901. Rev. $7.25.

108 STATE OF KANSAS, } ss:
Clark County, }

I, Manfred Brown, register of deeds, in and for said county, do hereby certify that the annexed and foregoing is a full, true and

complete copy of the record of a chattel mortgage and also of the certificate of acknowledgment thereof therein described, from W. B. Grimes Jr., to Siegel-Sanders Live Stock Commission Co. as the same appears of record, and was recorded in chattel mortgage record, vol. 6, at page 132 of the records of the register of deeds' office of Clark county, in the State of Kansas, on the 25th day of April, 1901, which record is now in my custody as such register of deeds.

In witness whereof I hereunto set my hand and the seal of said office this 4th day of April, 1902.

MANFRED BROWN.
Register of Deeds of Clark County, Kansas.

Cross-examination by Mr. O. G. YOUNG:

Q. Mr. Brown, do you know in whose hand write this Exhibit "C" is in, that is the body of it?

A. No, I don't know positive whose hand writing it is.

Q. Did you ever see Frank Siegel write his name personally?

A. No sir, hadn't seen it only from the letters.

Q. And your testimony in relation to this signature in which you say that it is his signature and your information causing you to make that statement, is derived from the signature of his that you have seen that purported to be his signature?

A. Yes.

MANFRED BROWN.

109 MANFRED BROWN, recalled by the plaintiff, testified as follows:

Direct examination by Mr. EVANS:

Q. Were assignments for either of the mortgagees which you have referred to ever filed in your—in the office of the register of deeds in Clark county, Kansas?

By Mr. YOUNG: We object to that testimony for the reason that it is incompetent, irrelevant and immaterial and not required under the statutes of Kansas.

By Mr. EVANS: We expect to show that it is required.

Which objection was by the court overruled to which ruling of the court the defendant at the time excepted.

A. No sir.

Q. Were assignments for either of them ever given you to be filed?

A. No, sir.

Q. Where do you make the record or notation of assignments of chattel mortgages which are filed with you for record?

By Mr. YOUNG: I object to the question as incompetent, irrelevant, and immaterial,——

Which objection was by the court overruled, to which the defendant excepted.

A. I have never had one filed. If I should I would make a note on it as I do releases or renewal and attach it to the original instrument.

Q. That is you would make——?

A. A note of it on the record.

Q. As in the copy which you have attached to your deposition?

A. Yes, I would make a note on the record of the mortgage, and the chattel index record; that is what it is called, really.

MANFRED BROWN.

110 H. A. SUTTMAN, a witness for the plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. STRAWN:

Q. What is your name?

A. H. A. Suttman.

Q. How old are you?

A. Twenty nine years.

Q. Where do you reside?

A. Kansas City, Missouri.

Q. How long have you lived in Kansas City?

A. A little over ten years.

Q. What is your business?

A. I am in the Stock Yards Bank of Commerce.

Q. Located where?

A. Located at the corner of Sixteenth and Genesee street in Kansas City Missouri.

Q. How long have you been connected with the Stock Yards Bank of Commerce?

A. A little over nine years.

Q. What is your position, if any, with that bank now?

A. I am the cashier now.

Q. How long have you been cashier of the Stock Yards Bank of Commerce?

A. Ever since its organization, I think five years now.

Q. Were you the cashier of that bank in the years 1900 and 1901?

A. Yes sir.

Q. Did you ever have any business relations or transactions with the Siegel-Sanders Live Stock Commission Company?

A. Yes sir.

Q. And with Mr. Frank Siegel as president?

A. Yes sir.

111 Q. Have you ever seen Mr. Frank Siegel, the president of the Siegel-Sanders Live Stock Commission Company, write?

A. Yes sir.

Q. Are you and were you in the years 1900 and 1901 familiar with the handwriting of Mr. Frank Siegel?

A. Yes sir.

Q. Do you know what, if any, relation Mr. Frank Siegel sustained to the Siegel-Sanders Live Stock Commission Company in the year 1900 and 1901?

Objected as incompetent——

By Mr. STRAWN: I don't know as it is material, as they have alleged it in their pleadings.

Q. For how many years prior to the present time or prior to the 1st of July, 1901, did Mr. Frank Siegel, individually, or the Siegel-Sanders Live Stock Commission Company, do business with your bank?

A. I can't state just the exact number of years.

Q. Was it two or more?

A. It was over two, I should judge three or four years.

Q. What was the nature of their business?

A. They were live stock commission men.

Q. What was the nature of the business transacted with the bank?

A. They carried their active account with us, checking account; discount paper, bought drafts and sold drafts.

Q. Who acted for the Siegel-Sanders Live Stock Commission Company in their business with you?

A. Part of the time Mr. Siegel himself, and some of the clerks in the office would occasionally have business with us.

Q. That is Mr. Frank Siegel?

A. Yes sir.

112 Q. I now show you a paper introduced in evidence as Exhibit "C" to the deposition of the witness Manford Brown, in this case, and which paper purports to be a release of a mortgage, said release purports to bear date the 24th day of November, 1900, is executed by the Siegel-Sanders Live Stock Commission Company by Frank Siegel president, to which is attached the corporate seal, the release purporting to release a certain mortgage made by W. B. Grimes, Jr., to the said Siegel-Sanders Live Stock Commission Company, bearing date the 27th day of June, 1900,—I will ask you to state, if you know, whose handwriting is under the words "Siegel-Sanders Live Stock Commission Company" that is to say, in whose handwriting are the words "Frank Siegel, P't" attached to the release, to which I have called your attention?

A. That is Frank Siegel's signature.

I will ask you to have this release also attached to the testimony of Mr. Suttman, and marked Plaintiff's Exhibit "D."

By Mr. YOUNG: We object to the introduction of that in any form or manner, as incompetent, irrelevant and immaterial, and not binding on the defendant.

By the COURT: It may go in evidence, with the right to reserve, and determine its competency afterwards.

Here the same is as follows: See page 76.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, VS.

113 E. T. GALBRAITH, a witness for the plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. STRAWN:

Q. You may state your name and occupation.
A. E. T. Galbraith, receiving teller of the Interstate National Bank Kansas City, Kansas.
Q. How old are you?
A. 44 years old.
Q. How long have you lived in Kansas City, Kansas?
A. I lived in Kansas City Missouri 24 years.
Q. And this bank is across the river, is it?
A. Yes sir, just across the State line.
Q. How long have you been receiving teller for the Interstate bank?
A. Since its organization, July, 1890.
Q. Continuously?
A. Yes sir.
Q. Do you know Mr. Frank Siegel?
A. Yes sir.
Q. The president of the Siegel-Sanders Live Stock Commission Company?
A. I do.
Q. Did you ever have or did your bank ever have any business dealings with the Siegel-Sanders Live Stock Commission Company or with Mr. Frank Siegel as president?
A. Yes sir the Siegel-Sanders Commission Company kept an account with us.
Q. For a number of years or for how long?
A. Three or four years.
Q. Did you ever see Frank Siegel, the president of it, write?
A. Yes sir.
Q. Have you in your possession any hand writing which you saw him write?

114 A. I have.
Q. Will you produce it please?
Witness produces same.
Q. To what is this signature you have just handed me?
A. That is the signature he signed to the stamp signature.
Q. Did you see Mr. Frank Siegel sign this?
A. I did.
Q. At or about what time did he sign it?
A. The date is on the card there, that was signed the 22nd day of January 1896.
Q. Have you seen him write other than this signature?
A. I have — him writing, yes sir.
By Mr. STRAWN: I will offer this signature in evidence, with the permission of Mr. Galbraith,—do you care to preserve this?
A. No sir.

By Mr. STRAWN: And ask that it be marked Exhibit "E."
There being no objection the same is as follows:
Name of corporation, firm or individual.
Siegel Frank.
To the Interstate national bank, Kansas City Kansas.
Signatures and by whom made.
Frank Siegel.
Address—Sta. "A."
Introduced by himself. Date 1-22-96.

Q. Have you any other evidence of Mr. Siegel's handwriting in your possession?
A. Yes sir, we have authority here to the treasurer of his company to sign checks also.
Q. Whose signatures are those?
A. That is his genuine signature.
115 Q. The one in the lower right hand corner is the one you referred to being the signature of Frank Siegel, P't and the one in the left hand corner being R. D. Swain?
A. Yes sir, treasurer.
Q. Are those the genuine signatures of Mr. Frank Siegel, president, and R. D. Swain, treasurer.
A. Yes sir.
Q. Do you care to preserve this?
A. I would prefer to keep that, yes sir.

By Mr. STRAWN: With the permission of counsel I will exhibit it to the court and let Mr. Galbraith retain it.
By Mr. GALBRAITH: It is a part of our records.
By Mr. STRAWN: For the purpose of the record generally, Mr. Galbraith refusing to let this be attached to his deposition, I desire to have this appear in the record, that there was exhibited to the witness and identified by him as having been signed as an original signature of Frank Siegel, the president, the following——
By Mr. YOUNG: Objected to—we object to the contents going into evidence.
By Mr. STRAWN: I desire to have identified in connection with the testimony of the witness, the document to which the witness testified, the document to which I refer is dated Kansas City, Missouri, June 6, 1900, and is addressed to the Interstate national bank, city, and reads: Dear sir——
By Mr. YOUNG: We object to the contents of that letter——
By the COURT: I said that I would permit you to give the date as identifying the instrument,—the contents have no relation to the matter in controversy here.
By Mr. STRAWN: I am not particular about that, I simply wanted to show the purpose why he wrote this. Does the court re-
116 fuse to permit me to read this letter.
By the COURT: Yes sir.

By Mr. STRAWN: We will except, and for the purpose of the record we will offer the document and the contents, which read as follows:

Inter-State national bank, city.

DEAR SIRS: Please honor checks on this company signed as below.
Yours truly, FRANK SIEGEL, P't.

R. D. SWAIN, Treasurer.

Q. I now exhibit to you a certain release of a mortgage which is attached to the deposition of Manford Brown, in this case, as Exhibit "C;" this release of mortgage purports to be signed by the Siegel-Sanders Live Stock Commission Company, Frank Siegel, P't. and with the corporate seal of that company attached, and purports to release a certain mortgage made by W. B. Grimes, Jr., given to secure a note for $11,111.23, and the said mortgage was dated on the 27th day of June, 1900, or as indicated here, 6-27-1900—recorded in the office of recorder of deeds, of Clark county Kansas, and I will ask you to state if you know, whose signature appears under the stamped words "Siegel-Sanders Live Stock Commission Company" upon this release?

A. I know that is—I call that Frank Siegel's genuine signature.

Q. That is the genuine signature of Frank Siegel?

A. Yes sir.

Q. You may state in what manner Mr. Siegel, as you testified a moment ago, signed his name under the rubber stamp, to which you have testified?

A. Frank Siegel——

117 By Mr. YOUNG: We object to that——

By Mr. YOUNG: Was the signature——

By Mr. STRAWN: I don't think it necessary that you should cross examine him——

A. (WITNESS:) I simply wanted to say that this was signed in the same manner the checks were signed.

By Mr. STRAWN: You may state whether or not the signature appearing on this release is the same signature of the Siegel-Sanders Live Stock Commission Company, Frank Siegel, P't, as appeared upon checks? which were drawn upon your bank by that company and which were cashed by you?

By Mr. YOUNG: We objected to that as incompetent, irrelevant and immaterial, and not the best evidence, which objection was by the court sustained, to which the plaintiff excepted.

By Mr. STRAWN: You say you have been receiving teller continuously for how many years?

A. Since July, 1890.

Q. You may state whether or not the checks presented to the Interstate bank and drawn by the Siegel-Sanders Live Stock Commission Company were received by you?

A. Yes sir.

Q. You may state, if you know, what business, if any, Mr. Siegel did for the Siegel-Sanders Live Stock Commission Company, with your bank?

By Mr. YOUNG: We object to that.

By Mr. STRAWN: I desire to show the method of doing business and the manner in which he obligated the Siegel-Sanders Live Stock Company, and his authority generally, as that company——

By Mr. YOUNG: That is certainly incompetent——

118 By Mr. STRAWN: And show in that connection how this witness became familiar with the signature of Mr. Siegel.

By the COURT: That wouldn't show that; he has already testified he saw these checks; if the purpose of it is to show the handwriting, there *is* two ways to prove that; one by showing his familiarity with the writing and his knowledge of it, and let him testify from his own knowledge of the writing and the other is by comparisons with admitted or proven signatures. He has testified to his knowledge of it, testified that this is the genuine signature. He has testified that he saw him make a certain signature here, which counsel, if they desired, could have him compare with the signature upon the instrument, and let him state from the comparison whether in his judgment that was genuine, but if the purpose of it, is to show the authority of the president to do business, I don't think that would be competent.

By Mr. STRAWN: I will save the exception, and ask one more question on that theory.

Q. You may state whether or not Mr. Frank Siegel, acting as president of the Siegel-Sanders Live Stock Commission Company ever transacted business with your bank, for and on behalf of the Siegel-Sanders Live Stock Commission Company, and if so what was the nature of that business?

By Mr. MARUM: We object to that as incompetent.

By the COURT: Objection sustained.

By Mr. STRAWN: Exception.

Q. Will you be good enough to state whether or not the signature attached to the release to which I have directed your attention, and the signature to the other document bearing date June 6, 1900, which you have identified as being the genuine signature of Mr. Frank Siegel, are both written by Mr. Frank Siegel, and

119 whether or not the signature to the two instruments are similar and alike.

A. Yes sir, I should say they are exactly the same.

Q. You may state whether or not the signature attached to the release which I have exhibited and the signature which has been introduced in evidence as Plaintiff's Exhibit "E," that is to say, the words, "Frank Siegel" upon the signature to this release of the

mortgage, and the words "Frank Siegel" upon Exhibit "E" are the same?

A. I think so. Yes.

Cross-examination by Mr. YOUNG:

Q. I will ask you to state whether or not the body of this Exhibit "C" is in Siegel's handwriting or in whose?

A. Do you mean the body here?

Q. Yes, sir.

A. It is not in his writing, I wouldn't say, from my knowledge of his handwriting.

Q. In Exhibit "C" the Siegel-Sanders Live Stock Commission Company is signed how?

A. It is signed here by a rubber stamp, and "Frank Siegel, Pt.," beneath it.

Q. Do you know whether that Frank Siegel, Pt., is signed by stamp or not?

A. I wouldn't think so, no sir.

By Mr. STRAWN: Do you mean that it is not?

A. It is not signed by stamp.

By Mr. YOUNG: Do you knowwhether or not he uses a stamp for his name?

A. I never knew of his using one.

120 Q. On this card, Exhibit "E" the signature of Frank Siegel—I will ask you if that purports to be Frank Siegel of the Siegel-Sanders Live Stock Commission Company?

A. It seems to be, yes sir.

Q. On the card?

A. Yes sir.

Q. And that signature that is signed there, "Frank Siegel," is the signature of whom?

A. Frank Siegel.

Q. Frank Siegel alone?

A. Yes sir.

Q. And not the signature of the Siegel-Sanders Live Stock Commission Company?

A. The same man, yes sir, that is his persoual signature.

Q. In comparing the two instruments you have exhibited here, Exhibit "E" and the paper date- June 6, 1900, heretofore offered, I will ask you if there is any difference between the two signatures on those two pieces of paper, and if so, what it is?

A. The general course of the two signatures are the same, of course, without that "Pt.," on the upper one.

By Mr. STRAWN: Have you ever seen any other signatures of the Siegel-Sanders Live Stock Commission Company signed the same as that one which is signed on Exhibit "C," attached to the deposition of Mr. Manfred Brown, and to which I have directed your attention,

as being the signature on the release of the mortgage, with the rubber stamp, and written underneath it "Frank Siegel, Pt."?

A. Yes sir.

Q. In what ways did you see those signatures and to what instruments were they attached?

121 Objected to as immaterial, which objection was by the court overruled, to which the defendant excepted.

A. That is the style of the signature that is signed to a check.

Q. And that was honored and paid by your bank?

A. Yes sir.

By Mr. YOUNG: As I understood you, in answer to Mr. Strawn's question, when he would draw his checks out of the bank, he would sign as Exhibit "C," the Siegel-Sanders Live Stock Commission Company, Frank Siegel, Pt.?

A. He would sign beneath a stamp similar to this, "Frank Siegel, Pt."

Q. Upon whose money did he draw out of the bank with his signature here?

A. This is a personal account, and this is the style of the firm account.

Q. You don't have his signature saying Siegel-Sanders Live Stock Commission Company, by Frank Siegel, Pt., in your bank?

A. Yes sir.

Q. Why didn't you bring that with you?

A. This is the same right here.

Q. That hasn't "Siegel-Sanders Live Stock Commission Company" on it?

A. No.

—. But you say now you have his signature in the bank where they use the rubber stamp there, "Siegel-Sanders Live Stock Commission Company by Frank Siegel, Pt."?

A. Yes sir.

Q. Why didn't you bring that signature along with you?

A. I supposed this would be sufficient.

By Mr. STRAWN:

Q. The one which you have in your bank is identical with the one which is attached to the release?

122 Objected to—sustained—plaintiff excepts.

By the COURT: This instrument that wasn't admitted in evidence but was testified to by you, purports to be an authority to your bank to pay out money on checks signed in that way?

A. Yes sir.

Q. Did you have any other authority in your bank to pay checks signed by the commission company other than is in that authority?

A. Do you mean on this signature?

Q. This purports to give you authority to honor checks on the company when signed "Frank Siegel, Pt." or "R. D. Swain, treasurer"?

A. Yes sir.

Q. You stated in answer to one of the gentlemen's questions that you paid checks signed "Siegel-Sanders Live Stock Commission Company, Frank Siegel, president,"—did you have an authority from the company to pay checks signed in that way?

A. Yes sir, we have authority from the board of directors.

Q. That is, other than this?

A. Other than this.

By Mr. STRAWN: Do you mean the board of directors of the Siegel-Sanders Live Stock Commission Company?

A. Yes sir.

Q. To pay checks signed the way that release is signed?

A. Yes sir.

W. B. GRIMES, JR., a witness for the plaintiff, being called and sworn testified as follows:

Direct examination by Mr. EVANS:

Before Mr. Grimes takes the stand, we offer in evidence that release, and ask that it be attached as an exhibit,—the release which has been identified and prove- to be the genuine signature——

123 By the COURT: I admitted that the first time you offered it here, reserving the right to reject it later.

Q. State your name, age, and place of residence.

A. W. B. Grimes, Jr., Ashland, Kansas, 35 years old.

Q. What is your business?

A. Cattle business.

Q. How long have you resided at Ashland Kansas?

A. About five years.

Q. Have you ever had any business transaction with the Siegel-Sanders Live Stock Commission Company?

A. I have.

Q. Through what period of time have you had dealings with that company?

A. Since the spring of 1897.

Q. What was the nature of those transactions?

A. Making loans with the Siegel-Sanders Commission Company.

Q. In such transactions, with whom did you transact that business?

A. Mr. Frank Siegel.

Q. Are you the same W. B. Grimes, Jr., as is given in these mortgages as the mortgagor?

A. Yes, sir.

Q. Are you acquainted with Frank Siegel?

A. Yes, sir.

Q. How long have you been acquainted with Frank Siegel?
A. Ten or twelve years.
Q. During your acquaintance with him, have you had occasion to see him write his name?
A. No sir.
Q. During such acquaintance have you had occasion to receive any instruments or communications signed by him?
A. Yes sir.
124 Q. Are you familiar with the signature of Frank Siegel?
A. Yes sir.
Q. In the course of such dealing, have you ever had occasion to see the signature of the Siegel-Sanders Live Stock Commission Company by Frank Siegel, president?
A. Yes sir.
Q. Are you familiar with the signature of the Siegel-Sanders Live Stock Commission Company, by Frank Siegel, president?
A. Yes sir.
Q. Look at the paper I now hand you, marked Exhibit "C" to the deposition of Manfred Brown, and state in whose handwriting, if you know, the words, "Frank Siegel, Pt." is?
A. I think it was written by Frank Siegel.
Q. State if you know whose signature is at the bottom of that purported release?
A. Frank Siegel.
Q. Isn't there something more than Frank Siegel?
A. "Frank Siegel, president."
Q. Isn't there something above that yet?
A. "Siegel-Sanders Live Stock Commission Company, by Frank Siegel, president."
Q. You may state whether or not in your opinion that is the signature of the Siegel-Sanders Live Stock Commission Company?
A. I should say it was.

By Mr. MARUM:

Q. I don't think he has qualified himself as an expert on handwriting.

By the COURT: He says he has.
By Mr. MARUM: I don't think that is enough qualification for an expert.
By the COURT: You can cross examine him then, it makes a *prima facie* case.

125 By Mr. EVANS: You executed the mortgage under which the defendants claim, and also the mortgage under which the plaintiffs claim, did you?
A. Yes sir.
Q. Each covered the same property—state whether you executed two mortgages covering the same property?

A. When one was due, I supposed it was taken up when I signed the other one——

By Mr. YOUNG: I object to what he supposed.

Which objection was by the court sustained.

By Mr. EVANS: State Mr. Grimes whether you executed these two mortgages, not what you suppose, but why you did it.

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial.

By the COURT: I understood in your stipulation you both stipulated that neither of these mortgages had ever been paid.

By Mr. YOUNG: That is true.

By the COURT: If that is the case, I don't know why it would be material in determining this matter.

By Mr. EVANS: The object of this testimony is to show that the mortgagor knew nothing of the outstanding mortgage claimed by the defendant, and that the release he thought was there was a *bona fide* release, and that the mortgage was released by the Siegel-Sanders Live Stock Commission Company and had he not supposed that he would not have given the second mortgage.

By the COURT: Do you want the court to assume that a man that owed $7,000 thought he paid it, and didn't know it?

By Mr. EVANS: I don't want the court to assume anything, I just want to show that the witness had no knowledge that the defendant bank was the owner of this paper.

126 By the COURT: He knew he had borrowed that amount of money.

By Mr. EVANS: We want to show by him that *the* thought he paid it off, giving a new mortgage in payment of it.

By the COURT: The mortgage would be the evidence of that,—it would not be competent.

By Mr. EVANS: We want to show by him that he made it——

By the COURT: The objection will be sustained.

By Mr. EVANS: Exception.

Q. You may state when you first became aware or had any knowledge of the fact that the defendant, The First National Bank of Geneseo, Illinois, had or claimed any interest in the mortgage under which they are now claiming?

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial,

Which objection was by the court sustained, to which the plaintiff excepted.

Q. State Mr. Grimes whether you ever received any notification or notice of any kind, prior to the time when Mr. Young and the other representatives of the defendant bank came to take possession of the cattle, that the defendant bank was the owner or had any interest in that note and mortgage.

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial.

Which objection was by the court sustained, to which the plaintiff excepted.

Q. You may state Mr. Grimes, when you first saw Exhibit "C" which you have already identified?

By YOUNG: Objected to as incompetent, irrelevant and immaterial.

Which objection was by the court sustained, to which the plaintiff excepted.

127 Q. I will ask you if you saw the paper marked Exhibit "C" prior to the 17th day of April, 1901?

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial.

Which objection was by the court sustained, to which the plaintiff excepted.

Q. I will ask you Mr. Grimes, if at a time prior to the 17th day of April, 1901, you made an examination of the chattel mortgage record No. 6, at page 127, in the office of the register of deeds of Clark county, Kansas?

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial.

Which objection was by the court sustained, to which the plaintiff excepted.

Q. I will ask you, Mr. Grimes, if you executed and delivered to the Siegel-Sanders Live Stock Commission Company any note or notes and mortgage to take up and pay a chattel mortgage executed by you on the 27th day of June, 1900, on 526 head of steers, and to secure the sum of $11111.23?

By Mr. YOUNG: We object as incompetent, irrelevant and immaterial. The stipulation already admitted that the mortgage was executed and not paid.

By Mr. EVANS: That stipulation as I understand it, does not go to any question of the notice of the parties, but it merely goes to the bare fact that now we agreed that the mortgage claimed by them has not been paid, but we do not by that admit by any manner or means, we have none, and had none, at the time this mortgage was executed under which we claim, it was not paid.

By the COURT: You are asking about Mr. Grimes' knowledge; that is wholly immaterial, he is the mortgagor while his
128 knowledge is not your knowledge, or presumed to be.

By Mr. EVANS: I want to show by him that he paid this off by executing a new mortgage and note, and that they haven't

notified him of their having this paper, that he has a new note and mortgage in his possession.

By the COURT: The mortgage would be better evidence of it.

By Mr. EVANS: I want to show he didn't know it.

By the COURT: He is not a party to it, and it is immaterial. The objection will be sustained.

To which ruling of the court plaintiff at the time excepted.

B. R. GRIMES, a witness for the plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. EVANS:

Q. State your name and occupation.

A. B. R. Grimes, cattleman.

Q. Have you ever had any business transactions with the Siegel-Sanders Live Stock Commission Company?

A. I have.

Q. What period of time have you had such transactions?

A. Through a period of several years.

Q. With whom have such transactions been carried on on behalf of the company?

A. Mostly with the president, Frank Siegel.

Q. What has been the nature of those business dealings between you and the Siegel-Sanders Live Stock Commission Company?

A. Loans and ordinary business connections.

Q. During the progress of those business transactions, have you ever seen Frank Siegel sign his name?

A. Yes sir.

129 Q. Have you ever seen the signature of the Siegel-Sanders Live Stock Commission Company during the progress of those business transactions?

A. I have.

Q. Are you familiar with the signature of Frank Siegel, and with the signature of the Siegel-Sanders Live Stock Commission Company by Frank Siegel, as president.

A. I am.

Q. Look at the paper which I now hand you, marked Exhibit "C" as a part of the deposition of Manfred Brown, and state whose signature is as the bottom of that exhibit.

A. Siegel-Sanders Live Stock Commission Company, by Frank Siegel, Pt.

Q. Is that the signature of the Siegel-Sanders Live Stock Commission Company, with which you are familiar?

A. It is?

C. H. TRUE, a witness for the plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. STRAWN:

Q. State your name.
A. C. H. True.
Q. Where do you reside?
A. Chicago, Illinois.
Q. What is your age?
A. 60.
Q. What is your business?
A. I am a cattle loan inspector for the National Live Stock Bank of Chicago, and the Chicago Cattle Loan Company.
Q. How long have you been so employed?
A. Since September, 1898.
130 Q. Continuously?
A. With the exception of about a year in northern Kansas.
Q. What year was that?
A. That was about from the fall of 1899 until the early summer of *of* 1900.
Q. Were you in the services of the Chicago Cattle Loan Company and the N-tional Live Stock bank in the month of February, 1901?
A. Yes sir.
Q. And continuously since that time?
A. Yes sir.
Q. What is your duty and business as inspector?
A. My duty has been to attend to the field work making inspections of loans for them.
Q. What do you mean by inspecting loans?
A. I received from the bank of the Cattle Loan Company——

By Mr. YOUNG: Objected to as not responsive.
Which objection was by the court overruled, to which the defendant excepted.

A. (con.) I received from the National Live Stock bank or the Chicago Cattle Loan Company, for both of whom I worked, slips or orders, giving the number——

By Mr. YOUNG: We object as not the best evidence.
Which objection was by the court overruled, to which the defendant excepted.

A. (con.) —of their loan, the amount of money, the name of the mortgagor and mortgagee and the property mortgaged.
Q. State whether or not you ever visited Ashland Kansas, in reference to a loan to Mr. W. B. Grimes?
A. I did sir.
Q. State when, or about when was that visit.
131 A. I reached Ashland on the 21st day of February and remained there until the 25th of February.

Q. In what year.

A. 1901.

Q. Are you the same C. H. True that testified in a deposition in this case, given at Chicago in March, 1902?

A. I am, sir.

Q. I hold in my hand the deposition taken before G. Russel Leonard notary public, in Chicago, on the 28th day of March, 1902, and I direct your attention to Plaintiff's Exhibit "2" attached to your deposition taken at that time and place, and ask you to state whether or not you have seen that document before?

A. Yes sir, that is my report upon the loan.

Q. You may state when you made that report.

A. I made it on the 23rd day of February, 1901.

Q. State what you did after arriving at Ashland Kansas, in reference to this loan to Mr. W. B. Grimes, Jr., and state the facts fully so that the court can get an understanding of what you did.

A. After reaching Ashland I went to the hotel, and from there to Mr. Grimes' house and told him who I was and upon what business I was called there——

By Mr. YOUNG: We object——

By Mr. STRAWN: Go on.

A. My purpose in doing this was to let him know that I was in the city, at least in the town, and that I should be able to see him on the next day.

Q. Which Grimes was that?

A. Mr. W. B. Grimes, Jr.

Q. State what relation, if any, he sustained to the National Live Stock Bank of Chicago, or the Chicago Cattle Loan Company?

132 A. He was a mortgagor and Siegel-Sanders Live Stock Commission Company were the mortgagees, and that paper was bought by the Chicago Cattle Loan Company, from whom I received my orders for inspection.

Q. State what, if any thing you did in reference to examination of the records or anything else, when you were in Ashland.

A. After informing Mr. W. B. Grimes Jr. that I was in Ashland, I went to the court house to the register of deeds' office, called for the last chattel mortgage record, which was produced, and beginning at the latest date, looked for all chattel mortgages on record——

By Mr. YOUNG: We object to any testimony of any result of his investigation as to what he saw in the register of deeds' office at Ashland, Kansas, for the reason that it is incompetent, irrelevant and immaterial, and the record is the best evidence, and what he might have seen or done, or didn't see, has no bearing whatever upon the issues in this case, and could not bind the defendant in any manner.

By the COURT: The record is the best evidence of their contents,

but one who has examined them may testify as to what is not on them. The objection is overruled.

To which ruling of the court the defendant at the time excepted.

By Mr. STRAWN: Go ahead.

A. I made a careful and thorough examination of the chattel mortgage record and an abstract of the same.

Q. Is that abstract attached to your deposition as Plaintiff's Exhibit "2"?

A. It is sir, and the back of my report is the abstract, as taken by me from the chattel mortgage records of Clark county——

By Mr. YOUNG: That does not come within the ruling—he is testifying as to what he did find.

133 Which objection was by the court sustained, to which the defendant excepted.

By the COURT: I shall exclude oral evidence of what the record shows.

By Mr. STRAWN: I will ask you whether or not you discovered from your examination of the record at that time, any mortgages other than the mortgage securing the two notes, aggregating about $14000, which mortgage bore date on or about October 17, 1900, a certified copy of which mortgage is attached to the deposition you hold in your hand, and covering the cattle mentioned and described in that chattel mortgage, to wit: 606 head, branded with a bar on the left hip or thigh, which was unreleased of record?

By Mr. MARUM: I object as calling for the contents——

By the COURT: Did you understand that question?

A. I——

By Mr. MARUM: They have stipulated that our mortgage was properly executed and duly recorded and filed in the office, and he is trying to show that it was released of record, and that is showing what the record shows.

By the COURT: The objection is overruled,—answer the question.

To which ruling the defendant excepted.

Q. State whether or not you found any mortgages other than the one which you represented at that time, unreleased,—can you not?

A. I didn't find other mortgages unreleased.

Q. On these cattle, the 606 head of bar steers?

A. No, sir, not at all.

Q. I refer now to the mortgage which was at that time owned by the Chicago Cattle Loan Company, which bore date on or about the 17th day of October, 1900?

134 A. That was the only mortgage on file that was for any considerable amount of steers.

Q. Branded as those?

A. Branded with the bar on the left thigh.

By Mr. YOUNG: We move to strike out the testimony as incompetent, irrelevant and immaterial,——

Which objection was by the court overruled, to which the defendant excepted.

By Mr. STRAWN: How much time did you expend in the examination of the records to ascertain whether or not your mortgage was the first lien upon the property therein described?

A. I took time enough to carefully examine all of the records.

Q. How much time did you take?

A. Three quarters of an hour, possibly.

Q. For what purpose did you go to that office?

A. To examine the chattel mortgage record.

Q. For what purpose?

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial—

Which objection was by the court overruled, to which the defendant excepted.

Q. Now you may answer.

A. I went there for the purpose of ascertaining whether there was any chattel mortgage or record in connection with our own lien or any other unreleased lien.

Q. On what property; on the property mentioned and described on the mortgage we hold?

A. On the property included in our mortgage, and also any other property that was not released.

Q. And you say that you discovered none other than on the mortgage that you represented?

A. No sir.

135 By the COURT: Let me get your purpose in this. This examination was made after the loan was made, as I understand it.

By Mr. STRAWN: This loan under which Mr. Young claims was made on June 27th, 1900.

By the COURT: Under which you claim?

By Mr. STRAWN: No, under which The First National Bank of Geneseo, the defendant claims, under a loan secured by a mortgage bearing date June 27, 1900.

By the COURT: Yes sir.

By Mr. STRAWN: Which expired by its terms November 1, 1900, and which was released as per this release we have introduced in evidence, November 27, 1900. Subsequent to that, and on October 17, there was a new mortgage made which the Cattle Loan Company had for $14000, and that was the mortgage which Mr. True went there at the time to investigate, and subsequently, and on the 17th day of April, 1901, our mortgage was executed, under which we claim in this suit.

By the COURT: I thought Mr. True was representing your mortgage.

A. He does, he says he represents the Chicago Cattle Loan Company and the National Live Stock bank, both. I will prove by him that their offices are together, and that he went there in February to examine the security pledged to the Chicago Cattle Loan Company by this mortgage which bore date October 17, 1900. That mortgage came due in April, 1901, and was renewed or a new mortgage given in place of it, which is the mortgage which we claim under in this suit, and the mortgage which we claim under bears date about April 17, 1901.

By the COURT: Then it was a second mortgage, that is, was a renewal mortgage of a previous debt?

By Mr. STRAWN: Yes sir. Our theory in this case is that
136 with that mortgage——

By the COURT: I am not caring about the theory, I want the facts. What I first suggested was the point that Mr. True was investigating a loan already made.

By Mr. STRAWN: Yes sir.

By the COURT: Now, if I understand your statement, the mortgage which was executed to secure that loan, was released, and a second mortgage made or another mortgage made to secure the same loan?

By Mr. STEWART: Yes sir.

By the COURT: And that is the mortgage under which you are claiming?

By Mr. STRAWN: That is right. And his investigation was in February, 1901, and the mortgage under which we claim was in April, 1901.

Q. What else did you do at Ashland, if anything?

A. After examining the records and got a correct report of that I started to Grimes' and went off to view the property on which we held the mortgage.

Q. Did you see the property at that time?

A. I saw all excepting about fifty steers north of Protection which I did not see.

Q. How were those steers branded which you saw at that time,—covered by your mortgage?

A. At the time I was there in February, the cattle couldn't be distinguished by brand fully, because they hadn't shed their hair at that time, but as many as I could see and could identify, it was a bar on the left thigh.

Q. Did you make your report on your business to the National Live Stock bank and the Chicago Cattle Loan Company?

By Mr. YOUNG: Objected to as incompetent, irrelevant and
137 immaterial and not binding on the defendant.

Which objection was by the court overruled, to which the defendant excepted.

By the COURT: He can state the fact whether he did or not.

A. I made my report to the Chicago Cattle Loan Company.

By Mr. STRAWN: As indicated in your testimony?

A. Yes sir.

Q. Do you know whether that report was communicated to the National Live Stock bank?

A. That I couldn't say because my duties kept me in the field all the time; I simply did my work that I was sent to do.

Q. State who are the officers of the Chicago Cattle Loan Company if you know?

A. The president of the Chicago Cattle Loan Company is Nathaniel Thayer, president, Levy B. Doud, vice president, R. Z. Herrick, treasurer, and Gates A. Ryther, secretary.

Q. Where is the office of the Chicago Cattle Loan Company?

A. With the National Live Stock bank.

Q. That is the plaintiff in this suit?

A. Yes sir.

Q. State who are the officers of the National Live Stock bank if you know, and were in 1901, at the time of your visit to Ashland?

A. The president of the National Live Stock bank at the time I made my visit to Ashland was Levy B. Doud, president, R. Z. Herrick, vice president, and Gates A. Ryther, cashier.

Q. Were the officers which you named as being the present officers of the Chicago Cattle Loan Company, the officers of that company at the time you made that visit to Ashland, in 1901?

A. The officers are the same today as they were at the time I was there.

138 By Mr. STRAWN: In that connection I desire to read the deposition of Levy B. Doud, taken at Chicago, before G. Russell Leonard notary public, on the 28th day of March, 1902.

By Mr. MARUM: I would state at this time that the depositions herein were not published one day prior to the beginning of this trial, but we do not wish to exclude them, and reserve the right to make the same objections to them as we would have done if we had had more time.

By Mr. STRAWN: The deposition to which I now refer was filed in the office of the clerk of this court on the 21st day of April 1902. My recollection is that the statute requires that they should be simply filed.

By Mr. YOUNG: I desire to object to all this testimony because it has been admitted here in open court that we bought this note and paid for it and now own it, and that it is unpaid, and I cannot see the relevancy of that testimony anywhere.

By Mr. STRAWN: This testimony, if the court please, goes to the extent and for the purpose of showing the diligence that we exercised in the purchase of this property and what pains we took to see that it was the first lien upon the property in question and to show

the nature of our transactions with the Siegel-Sanders Commission Company, and to show that no one thought two mortgages were in existence after this mortgage to the First National Bank of Geneseo was released of record——

By Mr. YOUNG: That don't bind us; the question is whether or not this mortgage has been paid or released; it has been admitted that this note has not been paid and is still alive.

By the COURT: Go ahead with the evidence.

139 LEVI B. DOUD, of lawful age, being by me first duly examined, cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Direct examination by Mr. STRAWN:

Q. State your name and occupation.

A. Levi B. Doud. Live stock commission buyer.

Q. How long have you been in the cattle business in the city of Chicago as commission merchant or otherwise?

A. Thirty years.

Q. State what if any connection you have had with the National Live Stock Bank of Chicago.

A. I was president of the National Live Stock bank from about the 1st of July, 1889 until 1902.

Q. What relation if any do you now sustain to that bank?

A. I am a director.

Q. What relation if any do you sustain to the Chicago Cattle Loan Company?

A. Vice president.

Q. How long have you been connected with the Chicago Cattle Loan Company?

A. Since its organization.

Q. When was that?

A. I don't know as I could tell, I think it was 1898 or 1899.

Q. What is the business of the Chicago Loan Company?

A. Buying and selling paper which is secured by chattel mortgages on live stock.

Q. What experience if any have you had with the purchase and negotiation of paper secured by chattel mortgage upon live stock. State in a general way.

140 A. We do sell large amounts, a good many millions a year of paper secured by cattle mortgages on cattle.

Q. What is the custom or practice with the National Live Stock bank and with the Chicago Cattle Loan Company with reference to the taking and discounting of paper?

A. Commission men at the yards take paper from feeders of cattle and bring it to us, which we discount and credit their account with the proceeds.

Q. Or pay them the money as the case may be?

A. Or pay them the money if they desire.

Q. State whether or not the Chicago Cattle Loan Company ever had any business transactions with the Siegel-Sanders Live Stock Commission Company?

A. Yes they did.

Q. State about when you commenced to deal with the Siegel-Sanders Commission Company, and what the nature of your business transactions.

A. I don't know just when we commenced to do business but we have bought paper from the Siegel-Sanders Live Stock Commission Company, amounting to from one to two hundred thousand dollars.

Q. With whom as the representative of the Siegel-Sanders Live Stock Commission Company, did you transact your business?

A. With Mr. Frank P. Swain.

Q. What relation if any did Mr. Frank P. Swain sustain to the Siegel-Sanders Live Stock Commission Company?

A. He was their representative in Chicago, and the Siegel-Sanders Commission Company, authorized him by letter to us to do business in their name.

Q. I ask you to look at the document now shown you and state from whom you received it?

141 A. We received it from Mr. Frank Siegel.

Q. What does that document purport to be?

A. Authority from the Siegel-Sanders Commission Co. to Mr. Frank P. Swain to do a banking business in their name.

By Mr. STRAWN: I will attach the document now shown the witness and which is in the words and figures following:

"To whom it may concern:

At a called meeting of the board of directors of the Siegel-Sanders Live Stock Commission Company held at the offices of the company in Kansas City Missouri, on Thursday, July 23rd, 1900, the following resolution was adopted:

'That Frank P. Swain is hereby appointed cashier of this company, in charge of the offices of this company at the Union stock yards, Chicago, Illinois.

'That he is hereby empowered to sign all checks, drafts and endorse all notes and legal documents which may require the signature of this company, on business transacted at our offices at the Union stock yards, Chicago, Illinois.'

The above is hereby certified as a correct copy.

FRANK SIEGEL, President.

F. P. SWAIN"

to the deposition of this witness as Plaintiff's Exhibit No. 12.

Q. There has been introduced in evidence a certified copy of the chattel mortgage purporting to have been given by W. B. Grimes, Jr., to the Siegel-Sanders Live Stock Commission Company under

date of October 24th, 1900, securing his two notes of like dates for the sums of $7033.24, and $7000 even, each, due six months after date and cover 633 head of native steer cattle. What if anything did you ever have to — as the representative of the Chicago Cattle Loan Co. with that chattel mortgage and the notes secured thereby?

142 A. I approved of the cattle loan company buying that paper with the chattel mortgage on the cattle as security for the same.

Q. At or about what time?

A. In October or the early part of November, 1900.

Q. What if anything did you do or did the Chicago Cattle Loan Company do to your knowledge, with respect to ascertaining the value of the security evidenced by the chattel mortgage, a certified copy of which is known as Plaintiff's Exhibit No. 1.

A. We sent out inspector there and had the property examined?

Q. What was the name of your inspector?

A. Mr. True, W. H. True.

Q. He was the same gentleman who has testified this morning in your presence?

A. Yes.

Q. Did you or did you not advance any money to the Siegel-Sanders Live Stock Commission Company at the time these notes and chattel mortgage, as you say, were discounted with the Chicago Cattle Loan Company?

A. Yes.

Q. How much did you advance?

A. We advanced the net amount of the two notes of about $7000 each after deducting interest.

Q. The interest at the rate prescribed in the notes and mortgage. This paper by its terms appears to have become due six months from October 24th 1900. What if anything did you do at the time of the maturity of the paper, or did the Chicago Loan Company do to your knowledge?

A. It was paid by the Siegel-Sanders Company, on April 27th, 1901.

Q. What if anything at the time of the purchase of this paper— by paper I mean notes secured by the mortgage, a certified

143 copy of which is introduced in evidence as Complain-t's Exhibit No. 1 did you have by information as to whether or not the mortgage aforesaid was or was not a first lien upon the cattle described therein?

A. It was so represented to us by the Siegel-Sanders Live Stock Commission Company. All paper taken from them was so represented, and we also relied upon the report of our inspector, Mr. C. H. True. He went there and reported in regard to the records.

Q. Subsequent to the — or at about the time of the maturity of the mortgage and notes, a certified copy of which mortgage is known as Plaintiff's Exhibit No. 1 to the testimony of C. H. True, did you

have any thing further to do with the Siegel-Sanders Live Stock Commission Company? If so, in what capacity? I mean now with reference to any papers or evidence of indebtedness made by W. B. Grimes, Jr.?

A. As president of the National Live Stock bank we discounted for Siegel-Sanders & Co. on April 27th, 1901, two notes of about $7000 each.

Q. Two notes bearing date April 17th, 1901 being for the sum of $7694.77 each and each being due and payable October 27th, 1901, with interest from maturity at the rate of seven per cent. per annum?

A. The said notes were secured by a chattel mortgage bearing date the 17th day of April, 1901 for $15389.54, securing the two notes about which I have just testified. The chattel mortgage was upon 606 head of cattle, 116 head being three year olds native steers, and 490 head being two year old native steers. This chattel mortgage appears to have been filed for record in the office of the register of deeds of Clark county, Kansas, on the 25th day of April 1901 and recorded in Book 6 of Records, at page 132, and which were represented to us as being the same cattle pledged in the
144 mortgage to the cattle loan company, and known as Plaintiff's Exhibit No. 1, to the deposition of Mr. True.

Q. State what if anything you gave to the said Siegel-Sanders Live Stock Commission Company on the said 27th day of April, 1902 in consideration for the two notes and the chattel mortgage which you have just described?

A. We credited their account with the amount of the notes less the discount.

Q. State what if any relation there is between the chattel mortgage made by Grimes and a certified copy of which is known as Plaintiff's Exhibit 1 to the deposition of the witness True and the chattel mortgage last referred to, securing two notes for the $7694.55 each, and recorded in Book 6 of Records at page 132 thereof?

A. A chattel mortgage last mentioned was given to take up or in place of the loan taken by the cattle loan company and represented by Plaintiff's Exhibit No. 1 to Mr. True's testimony, and it was so understood by the Siegel-Sanders Live Stock Commission Company and the bank.

Q. State what reasons if any there were why the Chicago National Live Stock bank took this loan from W. B. Grimes Jr., evidenced by the chattel mortgage bearing date April 17th, 1901, and recorded in Book 6 of Records at page 132?

A. Because as the officers of the Chicago Loan Company we had had this property inspected. It has been reported to us as a good loan, and because we had had our man personally examine the records to satisfy us beyond any doubt that the property described in the mortgage was clear of any liens except of the Chicago Cattle Loan Company, which was then being paid, and is represented by

the chattel mortgage, a certified copy of which is known as
145 Plaintiff's Exhibit 1 to Mr. True's testimony.

Q. At the time the National Live Stock bank discounted this paper of Grimes evidenced by the notes secured by the mortgage recorded in Book 6 of Records at page 132 and bearing date April 17th 1901, did the bank have any information either from the records or from any source whatever that there were any other liens upon the record prior to the lien evidenced by the mortgage described in this question?

A. They did not.

Q. When if at any time did the bank first learn, or did you, as an officer of the bank, first learn, that any one else claimed to have a lien against the property described in this chattel mortgage, other than the chattel mortgage dated April 17th, 1901, and recorded in Book 6 at page 132.

A. On receipt of a telegram from W. B. Grimes, bearing date May 21st, 1901.

Q. What was that telegram?

A. "Send good man here to protect your interests at once." Signed W. B. Grimes.

Q. Do you hold that telegram in your hands?

A. Yes.

By Mr. STRAWN: I will ask to have this telegram attached to the evidence of the witness as Plaintiff's Exhibit No. 13.

Q. You may look at the chattel mortgage bearing date April 17th, 1901, made by W. B. Grimes, Jr., to the Siegel-Sanders Live Stock Commission Company, securing the notes I have just shown you, and state whether or not you have seen that mortgage before?

A. Yes, this is a copy of the mortgage securing the notes which were discounted by the National Live Stock bank on the 27th day of April, 1901.

146 By Mr. STRAWN: In this connection I will also ask to have attached to the testimony of the witness a true copy of the chattel mortgage bearing date April 17th, 1901, from W. B. Grimes, Jr., to the Siegel-Sanders Live Stock Commission Company, securing his two notes for $7694.77 each, dated April 17th, 1901; and payable October 27th, 1901; said chattel mortgage being filed for record in the office of the register of deeds in Clark county, Kansas, on April 25th, 1901, and recorded in Book 6, at page 132 thereof. I ask that said certified copy be marked Plaintiff's Exhibit No. 14.

Q. You may look at the notes now shown you bearing date April 17th, 1901, for $7694.77 each, signed by W. B. Grimes, Jr., payable to the order of the Siegel-Sanders Live Stock Commission Company, October 27th 1901, and endorsed by R. D. Swain, treasurer, and state whether or not you have seen those notes before?

A. Yes. These are the notes which were discounted by the bank on the 27th day of April, 1901.

By Mr. STRAWN: I will also ask that there be attached as Exhibits Nos. 15 and 16 to the testimony of the said witness the two notes described in said chattel mortgage bearing date the 17th day of April, 1901, each for the sum of $7694.77 each, signed by W. B. Grimes Jr., and payable to the order of the Siegal-Sanders Live Stock Commission Company.

By Mr. STRAWN: I will reserve the original chattel mortgage and the notes to be introduced at the hearing. They may be marked now for identification by the stenographer as originals of Exhibits 14, 15 and 16.

Q. What if anything did you do after receipt of the telegram from W. B. Grimes under date of May 21st, 1901?

147 A. I came down town and sent Mr. James T. Meagher, of the firm of Winston & Meagher, to Ashland Kansas, to see what was the matter.

Q. State who at the time of the commencement of this suit owned the notes and chattel mortgage bearing date April 17th, 1901, the chattel mortgage being recorded in Book 6 on page 132 in the office of the register of deeds of Clark county, Kansas, and the notes being for $7694.77 each due October 27th, 1901?

A. The National Live Stock bank.

Q. State how long the said bank has owned said notes and chattel mortgage?

A. Since April 27th, 1901.

Q. You may state whether or not the said bank did prior to the time of the commencement of this suit, declare the indebtedness evidenced by the said notes and chattel mortgage last above referred to, to be due and payable?

A. We instructed our representative, Mr. James T. Maher when he left for Ashland, Kansas, to act for us in the matter, to do whatever in his judgment was necessary to protect the interest of the bank.

Q. Have the notes bearing date April 17th, 1901, for $7694.77 each or either of them or any part of them been paid to the said National Live Stock bank?

A. No.

LEVI B. DOUD.

FRANK P. SWAIN, of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination by Mr. STRAWN:

Q. You may give your full name and occupation.

148 A. Frank P. Swain, live stock commission.

Q. Where do you reside?

A. Chicago, Illinois.

Q. How long have you lived in Chicago?
A. Since August, 1900.
Q. Where did you live prior to that time?
A. Kansas City, Missouri.
Q. What if anything had you to do with the Siegel-Sanders Live Stock Commission Company in the years 1900 and 1901?
A. I was the manager of the Chicago office of the Siegel-Sanders Live Stock Commission Company.
Q. What is the Siegel-Sanders Live Stock Commission Company or what was it at that time?

Objected to as improper—which objection was by the court over ruled, to which the defendant excepted.

By Mr. STRAWN: They didn't make any objection then.
By the COURT: They have a right to make it now as to its competency.

A. A corporation under the laws of Missouri.
Q. In what business was it then engaged, during the years 1900 and 1901?
A. The live stock commission business.
Q. State where it had its office and principal place of business.
A. Kansas City Missouri.
Q. Who was the president of that company during those years?
A. Frank Siegel.
Q. What was you- connection with that company at Chicago during the year from July 23, 1900 to 1901?
A. I had charge of their business here from September 1st, 1900.
149 Q. What was the general nature of their business here?
A. We bought and sold cattle, hogs and sheep and negotiated loans.
Q. Did you ever have any business transactions as the representative of the Siegel-Sanders Live Stock Commission Company with the Chicago Cattle Loan Company?
A. Yes sir.
Q. Did you ever discount with the Chicago Cattle Loan Company any paper made or endorsed by W. B. Grimes Jr., secured by chattel mortgage or otherwise?

Objected to as immaterial, since the stipulation states that they had that transaction and the note is in existence and not paid.
Which objection was by the court overruled, to which the defendant excepted.

A. Yes.
Q. You have seen Plaintiff's Exhibit No. 1 attached to the deposition of the witness C. H. True, which is a certified copy of the chattel mortgage purporting to secure two notes, one for $7033.24, bearing date October 24, 1900 and due in six months and another for $7000 bearing the same date and also due in six months, and

ask you to state whether or not you ever had anything to do with that mortgage, of which Plaintiff's Exhibit 1 is a certified copy?

A. I recall having discounted such notes.

Q. With what officer — connection with the Chicago Cattle Loan Company did you make this discount?

A. I believe it was with Mr. R. X. Herrick, to the best of my recollection.

Q. State whether or not you at that time turned over to
150 Mr. Herrick the papers, that is to say, the chattel mortgage and the notes secured thereby.

A. I did.

Q. State what if anything you received at the time you discounted with the Chicago Cattle Loan Company the notes and mortgages, a certified copy of which mortgage is in evidence as Plaintiff's Exhibit No. 1, that is the cattle loan mortgage?

A. I received either a check of the Chicago Cattle Loan Company or received credit. Now you will see I have no recollection. I would not, without looking it up, tell if we got a check or whether we got credit for it.

Q. But the Siegel-Sanders Live Stock Commission Company either did receive credit or a check of the Chicago Cattle Loan Company for the $7033.24?

A. Yes sir.

Q. Now Mr. Swain I direct your attention to a certain other chattel mortgage which I hold in my hand and which is a mortgage purporting to have been given by William B. Grimes, Junior, Clark county, Kansas, to the Siegel-Sanders Live Stock Commission Company, securing two notes for the sum of $7694.77 each, and each bearing date April 17, 1901, and each payable by the terms thereof October 27, 1901. I will ask you to look at that mortgage, together with the two notes secured thereby, which I hold in my hand and which are numbered 1335 and 1336, and ask you to state whether or not you have ever seen those papers before?

A. I believe these to be the notes which I discounted.

Q. With whom?

A. The National Live Stock bank. These are the ones that were given last April?

151 Q. Yes.

A. Yes.

Q. State whether or not you received anything on account of these notes or the Siegel-Sanders Live Stock Commission Company received anything at the time these notes were discounted?

A. The account of the Siegel-Sanders Live Stock Commission Company received credit for the sale of these notes.

Q. What if anything did you do with the notes and chattel mortgage at the time you discounted them?

A. I delivered them to Mr. G. A. Ryther, the cashier.

Q. You may look at the endorsements on the back of those two notes and state in whose handwriting those endorsements are?

A. The endorsemnet of the Siegel-Sanders Live Stock Commission Company was made by R. D. Swain, treasurer.

Q. Do you know whether or not Mr. Swain was treasurer of the company at that time?

A. He was.

Q. You say in answer to the second last question that the Siegel-Sanders Live Stock Commission Company at the time those notes were discounted by you received credit from the National Live Stock bank, what do you mean by that?

A. I mean the National Live Stock bank credited to Siegel-Sanders Live Stock Commission Company's account, the amount of those notes, less the discount.

Q. Do you recall how much the discount was?

A. No, I have no recollection whatever.

Q. You may state if you know, in what manner the notes secured by the chattel mortgage, a certified copy of which is known as Plaintiff's Exhibit No. 1 to the witness C. H. True's testimony, were paid.

152 A. They were paid by the Siegel-Sanders Live Stock Commission Company by check on the National Live Stock bank.

Q. You may state if you know whether the mortgage, a certified copy of which is known in this record as Plaintiff's Exhibit No. 1, and the mortgage which has just been exhibited to you, bearing date as aforesaid on the 17 day of April, 1901, and recorded in Book 6 of Records at page 136 thereof, in the office of the register of deeds in Clark county, Kansas, were upon the same property, substantially the same.

By Mr. MARUM: We object as incompetent——

Which objection was by the court overruled, to which the defendant excepted.

A. My understanding is that the mortgage dated the 17th day of April, 1901, was secured by the same cattle that secured a mortgage dated October 24, 1900.

By Mr. MARUM: We object to what his understanding was.

Which objection was by the court sustained, to which the plaintiff excepted.

Q. And that is the mortgage dated October 24, 1900, the certified copy of which has been introduced in evidence as Plaintiff's Exhibit No. 1 to the deposition of C. H. True, is that right?

A. Yes sir.

Q. You may state whether you at the time you discounted this paper with the National Live Stock bank, knew that the First National Bank of Geneseo held, or claimed to hold, a mortgage upon the property described in the mortgage from Grimes to the Siegel-Sanders Live Stock Commission Company, bearing date April 17, 1901?

Objected to—overruled—exception.

A. I had no knowledge of any other mortgage being in existence on the cattle covered by the mortgage which was held by the
153 National Live Stock bank.

By Mr. MARUM: We object to the answer as not responsive to the question.

Which objection was by the court overruled, to which the defendant excepted.

Q. You are not now connected with the Siegel-Sanders Live Stock Commission Company?

A. I am not.

Q. When did you cease your connection with them?

A. On June 1st, 1901.

Q. I exhibit to you a certain authority purporting to come from the Siegel-Sanders Live Stock Commission Company and ask you to state whether or not you have seen theat paper before?

A. Yes, and it bears my signature.

Q. When did you first see that paper?

A. About September 11, 1900.

Q. What if anything did you do with that paper with reference to the National Live Stock Bank or the Chicago Cattle Loan Company?

A. After I had placed my signature on same it was delivered to the National Live Stock bank by Frank Siegel.

Q. Did you see this paper after it was delivered to the National Live Stock bank?

A. No sir, I believe not.

Q. Do you know that Frank Siegel delivered it to the bank?

A. Yes sir.

Q. State who, if any one aside from yourself, had charge of the business of the Siegel-Sanders Live Stock Commission Company in Chicago during the years 1900 and 1901?

154 A. There was no one besides myself in charge here.

Q. What did you do for them here?

A. I handled all of their financial affairs, made deposits, discounted their paper.

FRANK P. SWAIN.

By Mr. STRAWN: The exhibit attached to the witness Swain's testimony I have already read in evidence, and therefore I do not desire to read that. I assume that the certifications of the notary to these certificates need not be read.

By the COURT: Not necessarily, unless objected to, and those objections have to be urged before trial.

By Mr. STRAWN: I think that is all in the way of depositions that we desire to offer.

We also desire to have considered in evidence a certain portion of page 3 of the answer to the amended petition, filed herein by the

defendant on the 1st day of April, 1902, which said portion is in the words and figures following to wit:

"That after the execution and delivery of said promissory note as aforesaid, and before the maturity thereof, said Siegel-Sanders Live Stock Commission Company, by Frank Siegel, its duly elected, qualified and acting president, and being then and there duly authorized so to do, duly sold said promissory note to this defendant, for a valuable consideration to it paid by defendant, and duly endorsed the same on the back thereof, and delivered said note and the aforesaid mortgage to said defendant. That a true and correct copy of said note and the endorsements thereon, is hereto attached, made a part hereof and marked Exhibit "A" and that a true
155 and correct copy of said chattel mortgage is hereto attached, made a part hereof, and marked Exhibit "B" That defendant is now and has been ever since the sale and delivery of said note and mortgage, the owner and holder of the same, and is now the owner and holder of said note and mortgage given to secure the payment of said described note."

THORNTON W. SARGENT, a witness for the plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. EVANS:

Q. State your name and place of residence.
A. Thornton W. Sargent, Wichita, Kansas.
Q. How long how have resided at Wichita, Kansas?
A. Very nearly sixteen years.
Q. What has been your occupation since you have been in Wichita, Kansas?
A. Attorney at law.
Q. What courts in the State of Kansas have you practiced in during that period as attorney?
A. All of the courts.
Q. What if any schools are you a graduate of Mr. Sargent?
A. The law school of the Columbian college at Washington, D. C. and the literary department of the University of Michigan.
Q. During your experience as practitioner of the law in the State of Kansas, have you had occasion to examine the statutes, session laws and the decisions of the State of Kansas, construing the same respecting chattel mortgages?
A. I have.
Q. State whether or not you are familiar with the statutes, session laws and the decisions of the courts of the State of Kansas upon the same?
156 A. Yes sir.
Q. Look at the paper I hand you marked Exhibit "C," a part of the deposition of the witness Manfred Brown, and state Mr. Sargent whether or not in your opinion that instrument was, under

and by virtue of the law of the State of Kansas obtaining on the 24th day of November, 1900, and also on the 27th day of November, 1900, a good and sufficient release of the chattel mortgage therein described?

By Mr. YOUNG: If your honor please, he is calling for just what your honor is here to decide, the law in this case, the books themselves and the law on evidence and the law of chattel mortgages is the best evidence of what the law is.

By Mr. EVANS: If the court please, I am endeavoring to proceed with him as an expert.

By the COURT: I thought you stipulated on the evidence didn't you? Did you stipulate that the statutes, session laws and——

By Mr. YOUNG: Decisions——

By the COURT: Should be used as evidence?

By Mr. YOUNG: Of the supreme court and court of appeals.

By Mr. EVANS: We stipulate that they may be all used——

By the COURT: The objection will be sustained. The authorities hold that the law of a foreign State may be proven by persons who are familiar with it and have knowledge of it, and that is not calling for the law; you are not offering to prove the law by this witness, you are offering to take an expert opinion of him as to whether a certain instrument is a valid instrument.

By Mr. EVANS: As I understand the statutes of Oklahoma, they are as follows: "The unwritten or code law of any other State or foreign corporation, may be proved as facts by parole evidence, and the text of cases reported may be also admitted in evidence."

By the COURT: You are not seeking to prove the law.

157 After you prove what the law is the court will determine whether that is a valid instrument under the law.

By Mr. EVANS: As I understand it, the law of the State of Kansas on any proposition that may be advanced here is in this court a question of fact, and then in order for us to get before your honor the facts and the law of the State of Kansas as it existed, we have to bring evidence of some character in here. If there are statutes or decisions of our court which cover the identical point in issue, it is proper for us to introduce it, but if not, the statute gives us the right to introduce parole evidence.

By the COURT: You are not offering to prove the law by him, you are offering to prove whether this is a legal instrument or not.

By Mr. EVANS: Exception.

Q. You may state Mr. Sargent what the law of the State of Kansas was on the 24th day of November, 1900 and on the 27th day of November, 1900, respecting the release of chattel mortgages?

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial, the law is the best evidence—the session laws are the best evidence.

By the COURT: There is only one question—you introduced a

statute here, you didn't read it,—you introduced in evidence a whole article on the subject of chattel mortgages.

By Mr. YOUNG: And it was understood that they would read that.

By the COURT: I think that covers the question the gentleman is now inquiring about.

By Mr. EVANS: It does not cover it, if it did, we wouldn't want to prove it neither way. The law of the State of Kansas is silent upon the question as to whether or not within the State of Kansas
158 it is necessary to acknowledge a release of a chattel mortgage. I can prove that by Mr. Sargent if you desire, preliminary to this question.

By Mr. YOUNG: That is entirely a different proposition from the one you are asking the witness.

By Mr. EVANS: I think not.

Q. Question read by reporter.

By the COURT: What do you want to show by him, how a release should be executed?

A. Yes sir, I want to show under the laws of the State of Kansas obtaining at that time, it was not necessary to acknowledge it.

Q. By the COURT: I will sustain the objection.

By Mr. EVANS: Exception.

Q. You may state whether in your opinion on the 24th day of November, 1900 and the 27th day of November, 1900, it was necessary under the laws of the State of Kansas, to acknowledge the release of a chattel mortgage.

By Mr. YOUNG: We object to that, not that he might not be able to prove thet fact, but we object to it because there is a statutory provision there for the release of chattel mortgages in the statutes, and that is the best evidence.

By the COURT: Objection sustained.

By Mr. EVANS: Exception.

Q. You may state whether under the law of the State of Kansas on the 24th, day of November, 1900, and the 27th day of November, 1900, it was nec[illegible] to acknowledge the release of a chattel mortgage?

159 By Mr. YOUNG: We object to the proposition, because it is calling for the conclusion of this witness as to what the law is and the law is laid down here in the books, and that is just the proposition we are all the way down here to see your honor about.

By the COURT: Is that in the chapter that you introduced?

By Mr. MARUM: Yes sir.

By the COURT: You omitted the portion of the statute that referred to the satisfaction of real estate mortgages, didn't you?

By Mr. EVANS: Yes sir, that was shut out, it was offered and objected to, and shut out. That statute says it may be released in the same manner, as near as may be, and we want to show what that manner was.

By Mr. STRAWN: The statute provides in express terms that a chattel mortgage may be released in the same manner as a real estate mortgage; then it would be unnecessary to go beyond the statute to determine what the law is and what the custom is in the State of Kansas, but the chattel mortgage code provides that a chattel mortgage shall be released in the same manner as a real estate mortgage as near as may be. Now the real estate mortgage act provides that it shall be released in two ways, by filing a separate instrument or by words on the margin of the record, or in another way to enter the satisfaction on the instrument itself, and it is for that reason that we produce this witness to show how that statute has been construed and the uses and customs of the State of Kansas in reference to that statute in the matter of the release of chattel mortgages.

By Mr. MARUM: Here is the Oklahoma statute in the absence of the pleading thereon.

160 By Mr. EVANS: There is a stipulation on that subject, however.

Q. By the COURT: What is it you want to show, that it does not have to be acknowledged before an officer?

By Mr. EVANS: We want to show the manner in which a release of a chattel mortgage can be made in the State of Kansas and be effective at that time.

By the COURT: By what authority do you get it, is there some decision of the supreme court on the statutes?

By Mr. EVANS: By the construction that has been placed upon that section by the bar of the State of Kansas, and the custom among the practitioners; among those who have had dealings with chattel mortgage property. The law is well settled, although the question has never been presented to our supreme court. No one has ever raised the question but it is well settled——

By Mr. YOUNG: Where is it well settled?

By Mr. EVANS: In the State of Kansas.

By Mr. YOUNG: You say well settled, the supreme court hasn't settled it, and the statute has not settled it, I don't understand where it is well settled.

By Mr. EVANS: It has been settled wherever the question has arisen; there is no requirement that it be acknowledged, and the reason of it is where the requirement for it be acknowledged, that it will not be necessary: furthermore the general law is that an instrument or release must not be of any greater dignity than the instrument itself, and a chattel mortgage itself not having to be acknowledged, therefore on that principle, the release of it does not have to be acknowledged.

161 By Mr. YOUNG: The law does not require that the release be filed in Kansas at all, except as between the parties. The mortgagor can demand that, and he is the only party that can do that, and if he did not release it, he is under a penalty for not releas-

ing it, but there is no law that provides that the release shall be filed at all in satisfaction of a mortgage of chattels.

By the COURT: There is of chattels——

By Mr. YOUNG: That is as between the mortgagee and the mortgagor.

By the COURT: It says "Satisfaction shall be entered in the book in which—acknowledging satisfaction,"—of course that implies that it may be done by separate instrument,—"Shall not be recorded but filed and shall be referred to under the head of remarks and shall be filed in the office therewith, and filed in the office of the recorder of deeds—." There is a specific statement as to how it is done,—generally as separate instruments, but it may be done by entering upon the record.

By Mr. YOUNG: It says that satisfaction must be as near as can be like the satisfaction of a real estate mortgage, and a real estate mortgage act requires that an instrument that affects real estate, shall be acknowledged. Of course, if they don't want to offer the real estate law——

By Mr. EVANS: We offered it and you objected to it.

By Mr. YOUNG: You didn't call my attention or the court's to it.

By Mr. MARUM: That clause in the Kansas law which is different from ours is a protection to subsequent purchasers of mortgages on property, unless an affidavit of renewal is filed within 30 days before the expiration of a year,—they are protected. They did not allege our mortgage is——

162 By Mr. EVANS: And the right between these two parties in respect thereto will come up after the evidence is in, but we simply want to show that that release as filed would have been a good release of that mortgage then. Whether or not Mr. Siegel or the Siegel-Sanders Live Stock Commission Company have exceeded their authority and in doing so committed a fraud for which the defendant is not liable, is a question for the court to determine, but — we want to show is that that release was under the laws of the State of Kansas a good release.

By YOUNG: How could it be a good release when it is acknowledged by somebody else—the statute requires that it shall be acknowledged by the mortgagee or assignee.

By Mr. EVANS: No, but by this I am not asking this witness as to whether or not we are right in this controversy.

By Mr. STRAWN: We don't offer this testimony for that purpose; all we desire by introducing this testimony is simply to get the fact before the court that that would be a proper release, irrespective of the fact of whether or not the Siegel-Sanders Commission Company had any authority to execute it.

By Mr. YOUNG: Supposing the witness's answer would be "A proper release," then the court would have nothing further to say.

By Mr. STRAWN: All we desire to show is that this is a proper release as to form, as between the parties.

By the COURT: You have introduced in evidence here the statute

on the subject. You said to the court there has been no construction of it by the supreme court of the State of Kansas; if there is any law of the State of Kansas on the subject and the witness is familiar with it, I will permit you to prove it by him, but I don't understand you can go any further than to prove the law by him.

By Mr. EVANS: Where there is no written law, as your
163 statute expressly provides, we have a right to introduce evidence of the common law or unwritten law of a foreign state or territory. That is all I am seeking to do, and of course, if it was written, it would not come with- the purview of that section of the statute. If it was written and there were adjudications on it by the higher court, we would have the decision here, but under that section of your law, we are doing as it says, where there is no written law on the subject, to prove it by parole testimony.

By the COURT: The court has indicated to you what you can do.

Q. Question repeated by reporter.

Objected to as incompetent, irrelevant and immaterial and not the proper way to prove the laws of the State or Territory as contemplated by the statute.

By the COURT: I am inclined to think the objection is well stated. You are not asking him what the law is, you are attempting to prove a conclusion.

By Mr. EVANS: Exception.

Q. You may state, Mr. Sargent, in what manner releases of chattel mortgages could be made under the law of the State of Kansas on the 24th day of November, 1900 and the 27th day of November, 1900.

By Mr. YOUNG: Objected to for the same reason.

By the COURT: Sustained.

By Mr. EVANS: Exception.

Q. You may state what the law of the State of Kansas is and was on the 24th day of November 1900 and the 27th day of November 1900, as to the manner of releasing chattel mortgages within the State of Kansas.

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled, to which
164 the defendant excepted.

A. There were then three ways of releasing a chattel mortgage, one way by——

By Mr. MARUM: Objected to as not responsive——

By the COURT: I think the answer should be to the question, your answer is not responsive.

To which ruling of the court the plaintiff at the time excepted.

A. The law was that chattel mortgages should be released: First, by an entry upon the margin of the record by the mortgagee or by

an entry on the copy or by an entry on the original mortgage, or by a separate instrument, signed by the mortgagee.

Q. State whether or not when made on a separate instrument, the law of the State of Kansas at that time required that separate instrument to be acknowledged.

By Mr. YOUNG: Objected to as incompatent, irrelevant and immaterial.

Which objection was by the court overruled, to which the defendant excepted.

A. No sir, it did not.

Q. You may state, Mr. Sargent, what kind of a separate instrument was required under the law of the State of Kansas on the 24th day of November, 1900 and the 27th day of November, 1900, to release a chattel mortgage upon property in that State?

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial.

Which objection was by the court sustained, to which the plaintiff excepted.

Q. You may state what the law of the State of Kansas was on the 24th day of November, 1900, and on the 27th day of Novem-
165 ber, 1900, as to the manner of releasing a chattel mortgage by a separate instrument.

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial.

Which objection was by the court overruled, to which the defendant excepted.

A. It was that the separate instrument should properly refer to the mortgage released and be signed by the mortgagee.

Q. Is that all?

A. That is all.

Q. Look at the paper I now hand you, marked Exhibit "C" and state whether or not that instrument is in proper form by the law of the State of Kansas on the 24th day of November, 1900, and the 27th day of November, 1900, to release the chattel mortgage therein described?

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial

Which objection was by the court sustained, to which the plaintiff excepted.

Q. You may look at the paper I now hand you, marked Exhibit "C" and state what the law was in the State of Kansas on the 24th day of November, 1900, and the 27th day of November, 1900, respecting the sufficiency of Exhibit "C" as a release of a chattel mortgage?

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial.

Which objection was by the court sustained, to which the plaintiff excepted.

166 Cross-examination by Mr. YOUNG:

Q. Where did you get this law that you have undertaken to testify about here, was it common law or statute law or decisions of the supreme court?

A. It is what you might call the common law of Kansas, if there can be such a thing as that, it is not the common law of England.

Q. Where is that common law exercised in Kansas?

A. It is the practice and expression of the lawyers in the part of Kansas where I live, in respect to the law and the construction that they place upon it.

Q. You have stated Mr. Sargent that if such a release was signed by the mortgagee, that the mortgage would be released, regardless of who owned it or who controlled it or who was interested in it?

A. Yes sir, that would under some qualifications, of course.

Q. Give us the qualifications.

A. That release would be good as against the parties.

Q. What parties do you mean?

A. I mean it would be a good release of a mortgage as between the mortgagor and the mortgagee.

Q. How about an assignee?

By Mr. EVANS: Objected to as incompetent and improper cross examination.

Which objection was by the court overruled, to which the plaintiff excepted.

A. Do you mean a subsequent assignee or prior assignee?

Q. I mean an assignee of a chattel mortgage; we are talk-
167 ing about the assignee of a chattel mortgage, the owner of the note at the time it was released, the assignee of the note?

A. The assignee of a non-negotiable instrument, the release would be good as to him.

Q. How about the assignee of a negotiable instrument?

By Mr. EVANS: Objected to as incompetent and improper cross-examination.

Which objection was by the court overruled, to which the plaintiff excepted.

A. As between the mortgagee and the assignee of a negotiable instrument secured by chattel mortgage, the release would not be good in my judgment.

Q. I will ask you if an assignee of a chattel mortgage of a negotiable promissory note, could release it of record under the law you have stated?

By Mr. EVANS: Objected to as incompetent and improper cross examination,——

Which objection was by the court overruled, to which the plaintiff excepted.

A. Is the assignee an assignee of record?

Q. I am asking you the law now.

A. If he is the assignee of record, the assignee can release it; if he is not the assignee of record, he cannot.

Q. Where do you get such law as that?

A. The construction that is placed upon the statutes of Kansas.

Q. Is there any statutes of Kansas that require the assignment of a chattel mortgage to be recorded?

By Mr. EVANS: Objected to as incompetent and improper cross examination,——

Which objection was by the court sustained, to which the
168 defendant excepted.

Q. Where do you get the law that you have just said was the law?

A. As I told you it is the construction that is placed upon the statutes of the State of Kansas.

Q. By whom?

A. By lawyers of the State of Kansas, and by the supreme court.

Q. Do you remember what case in the supreme court?

A. Not especially now, but I know, taking the construction as placed upon the chattel mortgage law by our supreme court, and the statutes of Kansas and the construction placed upon them by the lawyers, that that is the law.

Q. Is that as to chattel mortgages?

A. Yes sir.

By Mr. EVANS: I now offer in evidence the decision of the supreme court of the State of Kansas in the case of H. W. Ellis *vs.* Mary E. Carr, in the 28th Kansas, at page 365, # page 497.

By Mr. YOUNG: Objected to because that relates to real estate and not personal property.

By Mr. EVANS: We contend that the same principle is involved. This relates to a chattel mortgage, but we contend that the principal involved in it is just the same, and under the construction placed upon it in that case, there is abundant ground for saying that the law of the State of Kansas relating to chattel mortgages, is the same.

By the COURT: The objection will be sustained.

The plaintiff offers in evidence the decision of the supreme court of the State of Kansas in the case of J. Thomas *et al.*, partners as the Citizens Bank, *vs.* A. E. Reynolds, reported in the 29th Kansas, at page 216, # page 304.

By Mr. YOUNG: Objected to as incompetent, irrelevant and
169 immaterial.

By Mr. STRAWN: This is the construction of the chattel mortgage law in a chattel mortgage case.

By Mr. MARUM: I think, your honor, that is the law making it a crime for any body but the holder of a chattel mortgage to release it.

By Mr. STRAWN: When I offered that chapter as a whole, counsel objected because it was passed subsequent to the execution of these mortgages.

By the COURT: What was the date of the release?

By Mr. STRAWN: November 24, 1900.

By Mr. MARUM: It shows at least, if anything of that kind was the custom, that the people represented by the legislature did not concur in it.

By Mr. EVANS: That was six months after it happened.

By the COURT: In the case before us, it presents just the reverse of this; here there was a satisfaction made by a party to the record, who had, so far as the showing now goes, no interest in the mortgage at the time they made it. I don't see that this throws any light on the subject.

By Mr. EVANS: The only object of our endeavoring to introduce that is to show that under the law of the State of Kansas, it was proper for an assignee to have filed his release of record.

By the COURT: The objection will be sustained.

To which the plaintiff excepts.

The plaintiff here rests.

170 The defendant offers in evidence the note dated June 27, 1900, payable November 1, 1900, for $11111.23, at 8 per cent. after maturity signed W. B. Grimes, Jr. with the endorsement "for value received we hereby assign this note to —— —— or order and waive demand, notice, protest of same, and guarantee the payment thereof at maturity. Siegel-Sanders Live Stock Commission Company, by Frank Siegel, Pt."

We also offer the endorsement on the note "The mortgage securing this note is duly stamped according to law."

The same is here marked Exhibit "F," and there being no objection the same is as follows to wit:

Siegel-Sanders Live Stock Commission Company.

Capital Stock, $250,000.00.

Rooms 73–74–75 Live Stock Exchange.

KANSAS CITY, Mo., June 27th, 1900.

November 1, 1900 after date I, we or either of us, promise to pay to the order of Siegel-Sanders Live Stock Commission Company, at

their office, eleven thousand one hundred eleven & 23-100 dollars $11111.23. With interest from maturity at the rate of 8 per cent. per annum until paid. Value received.

W. B. GRIMES, Jr.

No. 604. Due ——.

Endorsed: "For value received, we hereby assign this note to —— —— or order, and waive demand, notice and protest of same, and guarantee payment thereof at maturity. Siegel-Sanders Live Stock Commission Comp. By Frank Siegel, Pt."

"The mortgage securing this note is duly stamped according to law."

171 By Mr. YOUNG: I will also offer the chattel mortgage dated June 27, 1900, and ask that the mortgage be marked Exhibit "G" with its endorsements thereon.

There being no objection, the same is admitted, and it is — follows:

Know all men by these presents: that W. B. Grimes Jr., of the county of Clark, State of Kansas, party of the first part, in consideration of the sum of eleven thousand, one hundred eleven & 23–100 dollars, paid by Siegel-Sanders Live Stock Commission Company, a corporation, party of the second part, the receipt whereof is hereby acknowledged, have sold, assigned and delivered, and by these presents does sell, assign and deliver unto said second party, all the following article- of personal property, situated in the county of Clark and State of Kansas, to wit:

(526) five hundred twenty six head of cattle as follows:

(443) four hundred forty three head of native full aged one year old steers.

(83) eighty three head of native full age one year old steers.

All of the above cattle branded thus:

Being all the cattle owned by me in this brand, and being the same cattle now being held and grazed by themselves in my enclosed pasture, located near Ashland, in Clark county, Kansas, where they are to be held and are not to be moved or sold without notice to and the written consent of said second parties.

And being all the property of the above description owned or controlled by the mortgagor now on said premises, and this mortgage is intended to cover and include all of said property of the above description and any addition and increase thereto, located
172 on the above described premises and range, if any thereabouts. The marks and brands used above to describe said property are the holding marks and brands and carry the title, although said property may have other marks and brands. If the mortgagor should desire to mix any other property with the above, before doing so, he shall give a full description of said property intended to be so mixed, with the name of the owner thereof, to said

second party and obtain the written consent of said second party before mixing the same. This mortgage shall also cover and include all the right, title and interest of the mortgagor in and to the pasturage, feed pens, feed troughs and water privileges used in feeding said live stock. Said property to remain and be kept on the premises above described until the full payment of the indebtedness hereinafter described, unless sooner marketed or removed by and with the written consent of the mortgagee or its assigns. When marketed said cattle are to be shipped and consigned for sale to Siegel-Sanders Live Stock Commission Company, at the Kansas City stock yards, and when sold the proceeds thereof shall be applied first in payment of the usual and customary commissions to said Siegel-Sanders Live Stock Commission Company for selling the same, and the balance, or so much thereof as may be necessary, shall be applied on the indebtedness hereinafter described. If said cattle or any part thereof, be consigned or sold elsewhere than above, then said mortgagee shall be paid a commission of 50 cents per head on all the above described cattle.

Provided always, and these presents are upon this express condition that if said party of the first part shall pay or cause to be paid unto the said party of the second part, the aforesaid sum of eleven thousand one hundred eleven & 23–100 dollars ($11111.23) according to the terms of one certain promissory note as follows:

173 One note for $11111 23 dated June 27th, 1900 payable November 1st, 1900, after date.

All payable at the office of said Siegel-Sanders Live Stock Commission Company, Kansas City and all with interest thereon at the rate of 8 per cent. per annum from maturity or according to the terms of any renewal of said indebtedness which may be made by consent of said second party, its successors or assigns, and may be evidenced by the execution of a new note or notes in place of said original indebtedness at or after maturity, for the amount of the debt then unpaid and payable hereunder, and for which this mortgage is and shall be a continuing security until paid, whether said debt be evidenced by said original indebtedness above described or any renewals or extensions thereof, and which said indebtedness the party of the first part hereby agrees to pay on the maturity thereof, then these presents and everything herein contained shall be void, anything herein contained to the contrary notwithstanding. And it is hereby mutually covenanted and agreed between the parties hereto, that if default be made in the payment of said sum of money or any part thereof, or the interest thereon, according to the tenor and effect of said indebtedness, when the same became due and payable, and upon a failure to conform to or comply with any of the conditions and agreements herein mentioned, then the whole sum of money hereby secured shall at the option of the party of the second part, or the legal holder or holders of said note or notes, become due and payable at once without notice. And it is further agreed that in case of sale or disposal or attempt

to sell or dispose of the goods and chattels hereby mortgaged or a removal of, or attempt to remove the same from the premises aforesaid, or an unreasonable depreciation in value, or if from any other cause the security shall become inadequate, or the party of the second part shall deem itself
174 insecure at any time before said indebtedness is fully paid, whether the same be due or not, then and thenceforth it shall be lawful for the said party of the second part, its successors or assigns or its authorized agent, to enter upon the premises of the said party of the first part, or any other place or places wherein said goods and chattels or livestock aforesaid may be, to remove and dispose of the same, as aforesaid without resort to law, and without appraisement or notice (all right of redemption appraisement and notice of foreclosure required by law being hereby expressly waived), and all the equity of redemption of said party of the first part, at public auction or private sale, to the person or persons who shall pay the highest price for the same, and out of the avails thereof to retain the full amount of said obligation, with the interest thereon, according to the conditions thereof, together with all reasonable costs and expenses attending the same and conditions aforesaid, rendering to said party of the first part, or his legal representatives, the surplus money, if any there shall be, anything herein to the contrary notwithsatanding.

And until default be made as aforesaid, or until such time as the said party of the second part shall deem itself insecure as aforesaid, the said party of the first part to continue in the peaceable possession of all said goods and chattels, all of which in consideration thereof, he agrees, shall be kept in as good condition as the same now are, and taken care of at his own proper cost and expense, and upon the neglect or failure of said first party so to do, then said second party, its successors or assigns, may cause the same to be done, and for all expenses so incurred and sums expended, this obligation shall be a continuing security; and if from any cause said
175 property shall fail to satisfy said debt and interest aforesaid, said party of the first part hereby agrees to pay the deficiency.

For the purpose of obtaining the money at this time loaned by the second party and the benefit of future transactions, the first party states that the first party is the absolute owner of all of the above described property; that the same is free from any incumbrances, and that all of the same is now in the possession of said first party at the location.

In witness whereof, the party of the first part have hereunto set their hand and seal this 27th day of June in the year of our Lord, one thousand nine hundred.

W. B. GRIMES, Jr.

Signed, sealed and delivered in the presence of
M. G. STEVENSON.

STATE OF KANSAS, } ss.
County of Clark, }

Be it remembered, that on this fifth day of July A. D. 1900, before the undersigned, a notary public duly commissioned and acting as such within and for the county of Clark, aforesaid, personally came W. B. Grimes Jr. to me well known to be the grantor described in and who executed and whose name is subscribed to the foregoing instrument of writing as party thereto, and stated and acknowledged to me that he executed the same as his free act and deed for the purposes and considerations therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in Ashland in said county the day and year first above written.

My term of office as notary public will expire Oct. 5, 1904.

[SEAL] M. G. STEVENSON,
Notary Public.

(Officer taking acknowledgement should see that it is in proper form.)

176 Endorsed: No. 604. Chattel mortgage. From W. B. Grimes, Jr., Clark county Kansas, to Siegel-Sanders Live Stock Commission Company.

STATE OF KANSAS, } ss:
Clark County, }

A copy of this instrument was filed for record on the 12 day of July A. D. 1900 at 8 o'clock a. m. and duly recorded in Book 6 of M. at page 127.

MANFRED BROWN,
Register of Deeds.

Fee, $0.25.

Siegel-Sanders Live Stock Commission Co.

Capital Stock, $250,000.00.

Live Stock Exchange, Kansas City, Mo.

Due—Renewal affidavit filed June 20, 1901.
Security—Steers, 526. Cows —; heifers —; calves —; bulls —; $11111.23.
Due 11-1-4-1900.
(Rev. $5.25.)

177 By leave of court, the original instruments introduced in evidence by the respective parties, may be withdrawn, and copies substituted in lieu thereof.

By Mr. YOUNG: I don't hardly deem it necessary to read all of

these sections of the statute that has been offered in evidence here; as I understand they have been offered.

The defendant here offers in evidence the citation of the case of Burhans *vs.* Hutchison 25 Kansas, page 625, and the case of Swenson *et al. vs.* Moline Plow Co. *et al.* 14 Kansas, page 387.

By Mr. EVANS: Objected to as incompetent, irrelevant and immaterial, and not tending to prove any issue in the case, and not a proper way to show the law of the State of Kansas.

By the COURT: Have you got the volume of the Kansas reports you are offering this case from?

By Mr. YOUNG: No sir, I haven't but a portion.

By the COURT: Have you got the syllabus of the cases?

By Mr. YOUNG: No sir, I expected to find the Kansas reports here, but didn't find them. I also desire in connection with this section 4246, to offer the case of the Farmers and Merchants Bank of Cawder City *vs.* Bank of Glen Elder, reported in the 26 Kansas, at page 377, 26 Pac. 680 and the case of Howard *vs.* Bank, 44 Kansas 549, 24 Pac. 983.

By Mr. EVANS: Objected to as incompetent, irrelevant and immaterial, not tending to prove any issue in this case, and not a proper way to prove the laws of the State of Kansas, and not properly authenticated——

Upon which objection and the objection last preceeding, there was no ruling by the court.

Said citations and opinions are as follows, to wit:

178 Eli Burhans *vs.* Josiah C. Hutcheson *et al.*, 25 Kans., 625.

1. Note and mortgage—When payment of—No discharge of.—Where a mortgage on real estate is given to secure the payment of a negotiable note, and before the maturity of the note the note and mortgage are transferred by indorsement thereon to a *bona fide* holder, the mortgagor, although having no notice whatever of such assignment and transfer, cannot thereafter pay off the note or mortgage to the mortgagee so as to defeat the real owner and holder thereof from recovering. Such a holder takes the mortgage as he did the note.
2. Payment to payee of notes and mortgage; recovery by *bona fide* holder.—H. executed to B., on February 25, 1873, two negotiable promissory notes payable to B. or order, for $500.00 each, one payable November 1, 1874, and the other November 1, 1875, with interest at the rate of seven per cent. per annum. To secure the payment of the notes, H. and wife on October 20, 1873, executed to B. a mortgage on real estate. Before the maturity of either of said notes, they were duly assigned by indorsement thereon to one E. who is the *bona fide* owner and holder of the notes and mortgage. On the 9th of March, 1875, without the knowledge or consent of the owner and holder of

the notes, H. and wife executed to the original payee in full payment and satisfaction of the notes, a conveyance of seventy acres of the land embraced in the mortgage, supposing such mortgagee to be the owner of the notes and mortgage, upon his statement that the notes were in his possession, at his home, and that he would destroy them. *Held*, that as the payee was not the holder of the notes and mortgage and had no possession of them, and was not entitled to receive money or other property in payment therefor, the conveyance of the land to him did not pay or discharge the notes or mortgage, or prevent the *bona fide* holder from recovering thereon.

3. Mortgage—How not discharged—After certain negotiable notes, payable to the order of B., and a mortgage on real estate,
179 executed by H. to secure the same, had been duly transferred by endorsement thereon before maturity, the mortgagor, without actual notice of such transfer, made a conveyance of land to the mortgagee to pay the notes and satisfy the mortgage, without the knowledge or consent of the real holder and owner of the notes and mortgage; and thereafter the mortgagor and mortgagee went together to the office of the register of deeds in the county where the mortgage was recorded, and procured the register to write a discharge and satisfaction of the mortgage on the margin of the record, which was signed by the mortgagor, and attested by the register of deeds. Held, that such entry, not being signed by the mortgagee or his attorney, assignee or personal representative, was no discharge or release of record of the mortgage pursuant to the statute, and at most, as to third parties, was a mere written statement on the part of the mortgagor in favor of his own interest that he paid the mortgage which could not prejudice the rights of the *bona fide* holder of the notes secured by such mortgage.

(Comp. Laws of 1879, ch. 68, pp. 5.)

4. Assignment of mortgage—Need not be recorded—When.—The *bona fide* holder of negotiable paper, transferred to him by indorsement thereon before maturity, and secured by real estate mortgage, need not record the assignment of the mortgage, or bring home to the mortgagor, actual notice of such assignment, in order to protect himself against payments made after the assignment without his knowledge or consent by the mortgagor to the mortgagee.

5. Assignment of mortgage—Record of.—Sec. 3, ch. 68, Comp. Laws of 1879, may be interpreted as having application to mortgage standing alone, or those securing debts and notes of a non-negotiable character only. With this interpretation the
180 statute is not nugatory, and has ample room for operation, without bring extended to mortgages given to secure negotiable paper transferred by endorsement thereon before maturity.

Error from Douglas District Court.

Action brought by Burhans against Hutcheson and four other-, upon two promissory notes and a mortgage. Trial by the court at the October term, 1878, and judgment for the defendant. The plaintiff brings the case here. The opinion states the facts.

B. J. Horton, for plaintiff in error.
S. O. Thatcher, for defendant in error Farwell.
John Hutchings, for defendant in error Willard.

The opinion of the court was delivered by HORTON, C. J.:

This was an action brought by plaintiff against the defendants to recover upon two negotiable promissory notes, and to foreclose a mortgage upon real estate given to secure their payment. The case was submitted to the court without a jury, and the findings of fact are substantially as follows:

On the 25th day of February, 1875, J. C. Hutcheson executed and delivered to Taylor Brandon two promissory notes, payable to Brandon or order, for the sum of $500 each—one of them payable November 1, 1874, and the other —— 1, 1875, with interest at the rate of seven per cent. per annum.

On the 20th day of October, 1873, to secure the payment of the notes, J. C. Hutcheson and E. J. Hutcheson, his wife, executed and delivered to Brandon a mortgage on the southeast quarter of section 12, and the east half of the northwest quarter of section 13, in township 15, range 18, each, lying in Douglas county. The mortgage was duly recorded on the 20th day of October, 1873, in the office of the register of deeds of Douglas county. Before the maturity of either of said notes they were duly assigned by the indorsement thereon of the name of the payee, Taylor Brandon, and delivered to Eli Burhans, the plaintiff in this action, who has ever since been the holder
181 and owner of them. The notes are fully due and unpaid, (except $65 paid October 20, 1873) other than as hereinafter alleged. On the 9th day of March, 1875, J. C. Hutcheson and wife executed and delivered to Taylor Brandon a warranty deed (recorded August 10, 1875) conveying to Brandon a portion of the mortgaged premises, to wit: the north sixty acres of the southeast quarter of section twelve, and the west quarter of the east quarter of the northwest quarter of section thirteen, in township fifteen, range eighteen; and it was agreed between Hutcheson, mortgagor, and Brandon, mortgagee, at the time, that the conveyance of the seventy acres should stand in full payment and satisfaction of the two $500 notes and mortgage hereinbefore described as having been given by Hutcheson to Brandon. At the time of the execution of the deed to the seventy acres of land, Brandon represented to Hutcheson that he was in possession of the notes and mortgage from Hutcheson to himself and that they were at his house, about five miles from Lawrence, and that he would destroy them or bring them to him. Hutcheson, at that time, had no knowledge or information that Brandon had

transferred the notes and mortgage to plaintiff. They went together at the same time to the office of the register of deeds for Douglas county, and procured the register to write a discharge of the mortgage on the margin of the record in words and figures as follows: "For value received, I hereby acknowledge full payment and satisfaction of the within mortgage, and discharge the same of record. Witness my hand this 9th day of March, 1875.—J. C. Hutcheson. Attest: D. W. Littell, register of deeds;" which was signed by J. C. Hutcheson, he and Brandon believing that to be the proper way to execute a discharge. Hutcheson supposed the notes and mortgage destroyed until about the commencement of this action, not having seen them since October 20, 1873. At the time of the conveyance of the seventy
182 acres on March 9th, 1875, by Hutcheson to Brandon, Hutcheson was in the actual possession, under a warranty deed, of the whole two hundred acres, included in the mortgage of October 30, 1873, and has continued to occupy with his family the remaining one hundred and thirty acres to the time of the trial, being the sole occupant thereof, and cultivating the same. Taylor Brandon went into possession of the seventy acres deeded to him March 9th, 1875, and continues to occupy it. At the execution of the deed from Hutcheson to Brandon, March 9, 1875, of the seventy acres, Brandon was not the owner of, nor in possession of, the notes or mortgage, or either of them, and did not and never has produced them, or either of them, though often requested and frequently promising to do so; but at that date the plaintiff, Eli Burhans, was the owner and in possession of the notes and mortgage, and has no knowledge of the agreement between Hutcheson and Brandon for the conveyance of the seventy acres in payment or satisfaction of the notes and mortgage, or of any agreement or of any attempt to discharge the mortgage on the record. Upon the 31st day of July, 1875, Hutcheson and wife executed a mortgage upon the one hundred and thirty acres remaining to them, after deeding the seventy acres to Brandon, to the Sullivan Savings Institution, to secure the payment of $1000 and interest at twelve per cent. per annum; the mortgage was recorded on the same day. Upon the second day of October 1877, Hutcheson and wife executed, as satisfaction of the mortgage to the Sullivan Savings Institution, a quit claim deed to the one hundred and thirty acres, to defendant John W. Farwell, and the deed was recorded on the third day of October, 1877, and Farewell paid the full value of the land in good faith, and the Sullivan Savings Institution acted in good faith. Brandon, upon the 4th day of October, 1875, executed a mortgage upon the seventy acres deeded to him by Hutcheson and wife, to D. L. Hoadley, to secure a note of the
183 sum of $300 and interest at 12 per cent. per annum, dated also October 4th, 1875, given for money loaned by Hoadley to Hutcheson; the mortgage was recorded on the same day; the note and mortgage were subsequently and before maturity, for value received, indorsed and delivered to William B. Willard, who is now the owner and holder thereof, and there is now due on the note and

mortgage, from Brandon to Wm. B. Willard, the sum of three hundred and twenty two and 80-100 dollars, and a further sum of fifty dollars as an attorney's fee for the foreclosure of said mortgage.

Upon the foregoing findings, the trial court decided the notes set forth in the petition to be paid and the mortgage null and void; that William B. Willard was entitled to the first lien on the seventy acres deeded by Hutcheson to Brandon on March 9th, 1875, and that John L. Farwell was the legal owner of the 130 acres deeded him on October 2nd, 1877.

As the entry upon the book of mortgages in the office of the register of deeds of Douglas county, on March 9th, 1875, was signed by the mortgagor, instead of the mortgagee, or any party representing him, such entry was, as to third persons, a mere written statement on the part of the mortgagor, in favor of his own interest, that he had paid the mortgage of October 20th, 1873, given by him to secure the notes delivered to Brandon, but did not discharge or release of record, pursuant to the statute, such mortgage. (Comp. Laws of 1879, ch. 68 pp. 5.)

The principal question, therefore, in the case is, whether the conveyance of the 70 acres of land by Hutcheson to Brandon on March 9th, 1875, was a payment of the notes and a valid satisfaction of the mortgage, no actual notice having been brought home to the former of the assignment before maturity of the notes and mortgage to plaintiff. The court below seems to have held the conveyance a full payment and satisfaction of the mortgage. From the conclusions of
184 law stated, the court must have decided that where a negotiable note is secured by mortgage on real estate, and both are assigned by indorsement thereon before maturity to a *bona fide* purchaser, the mortgage is taken subject to all payments made by the mortgagor to the mortgagee at any time before actual notice to the mortgagor of such assignment. Counsel for defendants claim this to be the law, and have cited many respectable authorities in support thereof. We think the doctrine thus announced not sustained by reason or sound policy, and if adopted, it would be an unfortunate obstacle to commercial transactions so common in this State as the sale and transfer of negotiable paper secured by real estate mortgages, and that such a doctrine is not in accord with the previous decisions of this court controlling the principles of law applicable to negotiable paper secured by such mortgages. In this State, the common law attributes of mortgages have been by statute wholly set aside, and the ancient theories concerning such mortgages demolished. The mortgage is a mere security, creating a lien upon the property, but vesting no title. The debt secured by the mortgage is the principal thing, and the mortgage the mere incident following the debt wherever it goes, and deriving its character from the instrument which evidences the debt. Here, the negotiable notes are the principal evidence of the debt, and the mortgage is merely ancillary; the mortgage follows the notes; whoever owns the notes,

owns the mortgage. (Chick *v.* Willets, 2 Kas. 385; Swenson *v.* Plow Co. 14 Kas. 387) In the sate case of Carpenter *v.* Longan, 16 Wall. 271, Mr. Justice Swayne speaking for the court says:

"The note and mortgage are inseparable. The former is essential, the latter is an incident. An assignment of the note carries the mortgage with it, while the assignment of the latter alone is a nullity. * * * All the authorities agree that the debt is the
185 principal thing, and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same right in regard to both. There is no departure from any principal of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid, the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action where no such relation of dependence exists."

Counsel for defendants say, that conceding the correctness of the general doctrine laid down in Carpenter *v.* Longan, *supra*, yet, the adoption of pp. 3, ch. 68, Comp. Laws of 1879, has placed a legislative restriction upon the negotiability of all mortgages executed since its adoption, and that this statute thrown upon the assignee of negotiable paper secured by real estate mortgages, the burden of personal notification to the maker of the mortgage of the change of ownership, if he would cut off future payments to the mortgage. Our attention is called to Johnson *vs.* Carpenter, 7 Minn. 176, and to Van Keuren *v.* Corkins, 66 N. Y. 77, interpreting a statute like ours. In Johnson *v.* Carpenter, the mortgage is treated as a chose in action standing alone. In Van Jeuren *v.* Corkins, the suit was upon a bond and mortgage, and it does not appear that the bond was negotiable. However, Johnson *v.* Carpenter, and the other authorities referred to in the same direction, are not satisfactory to us, or rather, they are not in harmony with the laws of mortgages in this
186 State. Section 3 speaks of the recording of the assignment of the mortgage, and does not by its terms refer to negotiable paper, and it seems to us a strained interpretation to hold its provisions applicable, where a debt is evidenced by a negotiable note, secured by mortgage upon real estate, when such mortgage is merely ancillary thereto, and follows the note wherever it goes, deriving its character from such instrument. A better interpretation, and one clearly more in accord with the law of mortgages in this State, is, that such section has reference only to a mortgage standing alone, or one securing debts and notes of a non-negotiable character. Under this interpretation, pp. 3 of the statute is not negatory, but has ample room for operation. As Brandon had parted with all his

interest in the notes and mortgage before accepting the conveyance from Hutcheson and wife, and had no interest therein at the time, such conveyance did not extinguish the mortgage held by plaintiff; nor was it necessary for the plaintiff to record an assignment of the mortgage to protect himself from the payment to the mortgagee. The notes and mortgage went together, and the mortgagor, having made the conveyance and payment, without a surrender of the notes or the mortgage, did so at his peril.

The judgment of the district court will be reversed, and the case remanded with directions to enter judgment for plaintiff for the amount due him upon the notes, and for a foreclosure of his mortgage, in accordance with the views herein expressed.

All the justices concurring.

187 Samuli O. Swenson *et al. v.* The Moline Plow Company and C. M. Albinson.

Parties plaintiff; misjoinder; separate interests.—Where S. executed to A. two promissory notes, and a mortgage on real estate to secure the payment of the notes, and A. afterward assigned one of the notes to M., held that A. and M. cannot sue jointly as plaintiffs on the notes and mortgage, but each has his separate action.

Error from Cloud District Court.

The only question here is, as to the right of two or more parties respectively owning and holding separate notes secured by the same mortgage to join as parties plaintiff in an action on said notes and mortgage. The district court, at the August term, 1873, held that such joint action could be maintained, and gave judgment accordingly. Swenson and Swenson, the defendants, appeal, and bring the case here on error.

James Ketner, and C. W. McDonald, for plaintiffs in error.

Strain & Wells, for defendants in error.

The opinion of the court was delivered by VALENTINE, J.:

This was an action on two promissory notes and a mortgage. The facts in the case are substantially as follows:

The plaintiffs in error, Samuli O. Swenson and John P. Swenson, executed to the defendant in error, C. N. Albinson, two promissory notes and a mortgage on real estate to secure the payment of the notes. Afterwards Albinson assigned one of said notes to the other defendant in error, The Moline Plow Company. The notes were not paid at maturity, and this action was commenced by Albinson and the Moline Plow Company *jointly* against the Swensons to recover the amounts which they respectively claimed on said notes and mortgage.

The only question which we are asked to decide is, whether
188 a *joint action* may be maintained by the two plaintiffs below, or whether each had his separate action. In this State the

debt secured by a mortgage is the real subject of the action; the note given therefor is the principal evidence thereof, and the mortgage is merely ancillary thereto. The mortgage follows the note. Whoever owns the note, owns the mortgage. When the note is paid the mortgage is paid. When the action on the note is barred, by the statute of limitations, the action on the mortgage is also barred. Indeed, any defense that may be set up against the note, may be set up against the mortgage. But there is no separate action on the mortgage. The action must always be on the note, and it may be on the note either with or without the mortgage. And the action on the note, whether with or without the mortgage, is, so far as the note is concerned, substantially an action at law. The action is tried, so far as the note is concerned, in the same manner as any other action on a promissory note. Either party has the right to a jury, and the judgment is a personal judgment against the defendant, substantially the same as any other personal judgment. The judgment is much like a judgment in an ordinary attachment case. The judgment is for the amount due on the note, with an order that the mortgaged property be first sold to satisfy the judgment, and that if it does not satisfy the judgment, then that a general execution be issued against the property of the defendant. Where more than one note is given, there are as many causes of action as there are notes; and if any of the notes are assigned, then each owner of a note has a separate cause of action, and each has a right to have the mortgaged property sold to satisfy his claim. The mortgage is a security for each note. It is substantially the same as several mortgages for the several notes. The mortgage liens in favor of all the notes may be equal, or the lien in favor of one note may
189 be prior to that in favor of another note. In the present case, when Albinson assigned one of said notes to the Moline Plow Company, the company became the owner thereof, with the right to a separate action thereon. Each plaintiff then had a separate action, and a separate right to have the mortgaged property sold to satisfy his or its own note. Although the two notes were secured by one mortgage, yet the rights of the parties were the same as though the two notes had been secured by two different mortgages on the same piece of land. The notes are the principal thing, and the mortgage is ancillary. And as the notes are separate, the mortgage must be considered as a separate mortgage for each note. In the present case, Albinson wanted a judgment in his favor for the amount due on his note, and the mortgaged property sold to satisfy his judgment. The Moline Plow Company wanted a judgment in its favor for the amount due on its note and the mortgaged property sold to satisfy its judgment. Now where is there any community of interest in this? It is true, both want the property sold, but each wants it sold for a different purpose. What interest has Albinson in having the property sold to satisfy the Moline Plow Company's claim? And what interest has the Moline Plow Company in having the property sold to satisfy Albinson's claim? Each really wants the property

sold to satisfy his or its own claim, and not to satisfy that of the other. Instead of their being a community of interest, there is really an antagonism of interest between the plaintiffs. Either might have sued on his or its own note, and made the other a defendant, so as to have the priority of their liens on the mortgage property determined, for in this there is a conflict of interest; but they cannot sue jointly as plaintiffs for they have no interest in common. As
190 to joinder and misjoinder of parties plaintiff; see Harsh *v.* Morgan, 1 Kas., 293; Winfield Town Company *v.* Maris, 11 Kas., 148, *et seq.*; Hudson *vs.* Comm'rs of Atchison, 12 Kas., 140; Newcomb *v.* Horton, 18 Wis. 566; Barnes *v.* City of Beloit, 19 Wis., 93; Howland *v.* Supervisors, 19 Wis., 247.

The judgment of the court below is reversed, and cause remanded for further proceedings.

All the justices concurring.

191 Farmers and Merchants Bank of Cawker City *v.* Bank of Glen Elder.

Chattel Mortgages—Validity after One Year—Renewal.

1. Every chattel mortgage filed as required by the provisions of the statute, relating to mortgages of personal property, is void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith after the expiration of one year after the filing thereof, unless within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage, and if said mortgage is to secure the payment of money, the amount yet due and unpaid. Such affidavit shall be attached to and filed with the instrument or copy on file to which it relates. Paragraph 3905, Gen. St. 1889.
2. Howard *v.* Bank, 44 Kan. —, 24 Pac. Rep. 983, followed.
3. A subsequent mortgagee, who becomes such before the expiration of the year from the first filing of a prior chattel mortgage, cannot take advantage of an omission to renew the chattel mortgage within the year.

(Syllabus by the Court.)

Error from District Court, Mitchell County; Clark A. Smith, Judge.

Kelly and Thorp, for plaintiff in error.

A. H. Ellis, for defendant in error.

192 HORTON, C. J.:

Replevin for a horse and a cow of the value of $70, brought originally before a justice of the peace, by the Bank of Glen Elder, against the Farmers and Merchants Bank of Cawker City. An ap-

peal was taken to the district court. In that court the plaintiff below was permitted to amend his bill of particulars twice. To the last amended bill of particulars or petition the defendant below filed a general denial. Upon the trial, at the close of the plaintiff's evidence, the defendant filed a demurrer, for the reason that it failed to prove a cause of action. The court sustained the demurrer but allowed the plaintiff to re-open the case, and introduce further evidence. When the plaintiff finally rested, the defendant for the second time demurred to the evidence, but the demurrer was overruled. The jury returned a verdict for the plaintiff. Subsequently the court entered a judgment that the plaintiff recover $75.70 as his interest in the property in controversy, and also its costs. The defendant below excepted and complains of the judgment rendered.

It is urged that the trial court erred in permitting the plaintiff below to finally amend its bill of particulars so as to charge the Farmers and Merchants Bank of Cawker City as a copartnership, composed of U. G. Paris and F. M. Owen, instead of a corporation, as originally alleged. "Discretion is largely vested in a trial court to allow amendments to pleadings and such amendments will not be grounds for error unless it is shown that there was a flagrant abuse of discretion." Stith *v.* Fullinwider, 40 Kan. 73 19 Pac. Rep. 314; Carr *v.* Catlin, 13 Kan. 393; Board *v.* Campbell, 17 Kan. 537. The district court also has power, in the furtherance of justice, to permit the amendment of a petition by striking out one name and inserting another, when it is shown that the first name was used by mistake. Bank *v.* Pappan, 6 Kan. 456; City of Atch-
193 ison *v.* Twine, 9 Kan. 350; Hanlin *v.* Baxter 20 Kan. 134; Weaver *v.* Young, 37 Kan. 70, 14 Pac. Rep. 458. The trial court, in its discretion, had the power, after sustaining the first demurrer to the evidence, to reopen the case, and permit further evidence to be introduced. Section 139, Civil Code; Cook *v.* Ottawa University, 14 Kan. 548; Railroad Company *v.* Dryden, 17 Kansas 268; It is further urged that the trial court erred in overruling the objection to the introduction of any evidence under the second amended bill of particulars or petition. It is said that there was no allegation of any demand for the property prior to the commencement of the action. The defendant upon the trial attempted to show trial in itself, and the right of possession incident thereto under a chattel mortgage dated the 8th of March, 1886, and which was attempted to be renewed the 31st day of March 1887; therefore no proof of demand and refusal was required. Raper *v.* Harrison 37 Kan. 243; 15 Pac. Rep. 219; Bogle *v.* Gordon, 39 Kan. 31, 17 Pac. Rep. 857; Machine Co. *v.* Pann, 42 Kan. 372; 22 Pac. Rep. 417. The bill of particulars or petition, however, as amended, stated that the plaintiff below claims special ownership of the property under a mortgage executed by R. H. Mattern, to the plaintiff through J. C. McNerney, the cashier of the plaintiff. The amended pleading also alleged that R. H. Mattern, at the time that he executed the chattel mortgage, was the absolute owner of the property described therein

and had the lawful authority to mortgage and incumber the same that the debt secured by the mortgage had become due and payable, and the mortgagor was in default; that the plaintiff was entitled to the immediate possession of the property; that the defendant wrongfully, unlawfully and unjustly detained the same from the plaintiff, and wholly deprived the plaintiff from all use and benefit
194 thereof. These allegations were sufficient, as against the general objection to the introduction of any evidence, to show that the detention of the property by the defendant was wrongful, and a demand and refusal might have been properly offered in evidence, if it were necessary, under Raper *v.* Harrison, *supra*, to establish a demand and refusal. If the amended pleadings were not sufficiently specific they could have been amended on motion of the defendant below.

It is finally urged that the trial court erroneously instructed the jury as follows: "That in no event can the defendant prevail in this action on account or by virtue of any rights claimed to have accrued to it under and by virtue of the chattel mortgage offered in evidence. Such chattel mortgage of defendant, not having been shown by the evidence to have been renewed, as is required by law, is of no force as to the plaintiff's mortgage, if any mortgage plaintiff had upon the property in controversy." Upon the same ground the trial court withdrew from the consideration of the jury the renewal affidavit of the chattel mortgage of the 8th of March, 1886, but filed March 10, 1886. This renewal is referred to in the record as "Exhibit H," and was filed March 31, 1887, more than a year after the filing of the mortgage of March 10, 1886. One mortgage of the plaintiff below was filed April 17 1886 and the other mortgage, called Exhibit "A" was filed May 12, 1886. Both of these mortgages were subsequent to the mortgage of defendant below of March 10, 1886. The instruction was erroneous under the authority of Howard *v.* Bank, 44 Kan. —, 24 Pac. Rep. 983. It was said in that case that "a subsequent mortgagee with notice of prior mortgage is not a subsequent mortgagee in good faith under paragraph 3905 of the General Statutes of 1889. The words 'subsequent purchasers' and 'subsequent mortgagees in good faith' in paragraph 3905, mean only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year from the filing of the mortgage." Jones Mortg. (3d ed.) # 293, states the rule in the same way: "Pur-
195 chasers or mortgagees who became such before the expiration of the year from the first filing, cannot take advantage of an omission to refile the mortgage. Such persons or mortgagees have notice of the existing mortgage, and take title subject to it. The statute was intended to prevent imposition upon them, and not to relieve them from incumbrances valid against them when they acquired their own title. They stand in the same position the mortgagor was in when they took their title from him." See the authorities there cited, the decisions in Michigan and Ohio are contrary to this rule but the great weight of authority is as stated in the prior de-

cision of this court. Again, paragraph 3906, Gen. St. 1889, reads: "If such affidavit be made and filed before any purchase of such mortgaged property shall be made, or other mortgage deposited, or lien obtained thereon, in good faith, it shall be as valid to continue in effect, such mortgage as if the same had been made and filed within the period above provided." It was also said in the Howard case, *supra* that paragraph 3905, Gen. St. 1889, "does not include intermediate purchasers or mortgagees. This construction is based upon reason. He who purchases after the year has expired during which a mortgage remains in force has a right, in the absence of the renewal affidavit, to suppose the mortgage has been paid, even though not released on the record; but he who purchases before the year expires, takes with notice of the mortgage and the rights of the mortgagee under the same."

Therefore the plaintiff below, having taken the second chattel mortgage soon after the filing of the first mortgage, was not a subsequent mortgagee in good faith, so as to have a prior lien to
196 the first mortgage, although the first mortgage was not properly renewed within the year.

Upon the oral argument the sufficiency of the record was challenged, and the claim was made that there is nothing here for review. We must decide in favor of the sufficiency of the record. In Ryan *v.* Madden ante, 679 (recently decided) it was ruled that "where there is attached to a petition in error a case-made, in which are found what purports to be copies of the pleadings and proceedings in the cause, but which are not specifically referred to and identified by marks and numbers, and there is attached to the case made a certificate of the judge and the attesting signature and seal of the clerk, the presumption will be that the copies of the pleadings and proceedings therein are what they purport to be, and that all were included in the case made when it was served upon the defendants, settled and signed by the judge."

The judgment of the district court will be reversed, and cause remanded for a new trial.

All the justices concurring.

197 Howard *et al. v.* First Nat. Bank of Hutchison.

Chattel Mortgages—Conversion of Mortgaged Property—Subsequent Purchasers.

1. A mortgagee entitled to the possession of personal property covered by his mortgage, may maintain an action against a third party, who has converted the same, without first obtaining a judgment against the mortgagor and without making him a party to the suit.
2. A subsequent mortgagee with notice of prior mortgage is not a subsequent mortgagee in good faith under paragraph 3905 of the General Statutes of 1889.

3. The words "subsequent purchasers" and "subsequent mortgagees in good faith," in paragraph 3905, mean only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year from the filing of the mortgage.
4. The taking of a second mortgage to secure the same debt secured by a first mortgage, and upon the same property, does not operate as a satisfaction and release in law of the first mortgage.

(Syllabus by Strang, C.)

Commissioner's Decision. Error to District Court, Harvey County, L. Houl, Judge.

Ady & Nicholson and W. E. Brown for plaintiffs in error.

Whiteside and Hutchison and Vandeveer & Martin for defendant in error.

STRANG, C.:

Action for damages for the conversion of certain sheep, begun by the plaintiff below in the district court of Harvey county, February 18, 1886. Plaintiff's right to recover was based upon a
198 chattel mortgage covering the sheep, which had become absolute, and an unsuccessful demand of the defendants below for the possession of said sheep. The defendants answered: (1) General denial; and (2) possession of the sheep under other and prior mortgages; and (3) an agister's lien. To which the plaintiff replied: (1) General denial; (2) want of consideration and fraud in the mortgage under which defendants below took possession of the sheep; and (3) that the notes and mortgages of defendants below were taken with full knowledge on their part of the mortgages of plaintiff below. The case was tried by the court and a jury, on the 10th day of May, 1887, resulting in a verdict for the plaintiff, for the sum of $779.38. A motion for a new trial followed, which was overruled and judgment entered, to which ruling and judgment the defendants excepted, and file their case made in this court, asking a reversal of the judgment of the district court.

December 1, 1884, H. C. Reeder gave the defendant, plaintiff below, a mortgage on certain sheep to secure the payment of a note for $500. January 2, 1885, Reeder gave a mortgage to the Bank of Burrton on certain sheep and other property, to secure a claim of $1,622.10. January 19, 1885, said Reeder gave a mortgage to J. E. Howard on 3000 head of sheep, to secure an alleged claim of $3000. May 21, 1885, Reeder gave a mortgage to the plaintiff below, The Bank of Hutchinson, on certain sheep and other property, to secure a loan of $175.00. July 10, 1885, Reeder gave a mortgage to the First National Bank of Newton on sheep for $500, to secure a claim for $500. The mortgage to the plaintiff below, December 1, 1884, was recorded in Harvey county, December 3, 1884. The mortgage to the Bank of Burrton was recorded in Harvey county, March 28, 1885. The

mortgage for $175. to the Bank of Hutchinson was recorded in Harvey
couuty May 21, 1885. The mortgage to the Bank of Newton was
199 filed for record July 10, 1885, in Harvey county, Kansas. On
the 29th day of June, 1885, Reeder gave the plaintiff below a renewal note and mortgage, renewing the two notes for $500 and $175 with $25 added to the latter note, covering the same sheep included in the mortgage of December 1, 1884, with their increase. This mortgage was recorded in Harvey county June 30, 1885. Reeder lived in Harvey county, and the sheep were kept there. The first question discussed in the brief of the plaintiffs in error, is that the petition of the plaintiff below does not state a cause of action. They say that the petition fails to show that the indebtedness between the plaintiff below and Reeder, the mortgagor, was ever judicially ascertained, and the petition does not make Reeder a party to the suit. We have discussed this question in the case of Howard *vs.* Burns, ante, 981 (decided at this term), and cited authorities covering the question, and now hold in this case that this objection is not good, upon the strength of that case, and the authorities there cited. The second proposition of the plaintiffs that the renewal affidavit attached to the mortgage of December 1, 1884, is not sufficient, and therefore the said mortgage expired at the end of the year from its date. We do not care to discuss the sufficiency of the affidavit, as we believe with the trial judge that, under the circumstances of this case, the renewal affidavit is not a material matter. The affidavit could only be material in case there were subsequent purchasers or mortgagees in good faith. But there are no subsequent purchasers and no subsequent mortgagees in good faith—

First. Because all the mortgagees had full knowledge of the mortgages of the plaintiff below, and of the claims they secured.
200 They each knew that the claims secured by such mortgages were not paid in whole or in part. In Gregory *v.* Thomas, 20 Wend. 17, Mr. Justice Cowen says: "To say that a man takes in good faith when he acts with notice, and of course under con-cious hostility to another, who has before taken a similar title, would be a legal solecism. The object of the statute here is that of all the other registry acts,—to prevent imposition upon subsequent purchasers and mortgagees, who must many times govern themselves by appearances. When everything is actually explained to them, they have the best kind of notice, and must be holden to take subject to prior incumbrance." Second. Because the language of the statute, (paragraph 3905, Gen. St. 1889.) "every mortgage so filed shall be void as against the creditors of the person making same or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless, within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit etc." does not include the intermediate purchasers or mortgagees, that is, purchasers or mortgagees who purchase, or whose mortgages were taken, intermediate

the time of filing such mortgage and the end of the year during which it remains in force, without the renewal affidavit, but means only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year, and after it became necessary to file a renewal affidavit to continue the mortgage in force. This construction is based upon reason. He who purchases after the year has expired during which a mortgage remains in force, has a right, in the absence of the renewal affidavit, to suppose the mortgage has been paid, even though not
201 released on the record. But he who purchases before the year expires, takes with notice of the mortgage and the rights of the mortgagee under the same. If, therefore, the mortgagee fails at the end of the year, and within the time prescribed by the statute, to file his renewal affidavit, the purchaser is not affected adversely by the failure to file the affidavit, though the lien of the mortgage as to him remain intact. His rights are unaffected. They remain the same as before. He has invested nothing upon the strength of the failure of the mortgagee to file his renewal affidavit. At the time he purchased, he knew of the incumbrance. This knowledge continues, and he may not be said to be a purchaser in good faith. The same reasoning applies to intermediate mortgagees; but we are not left to a decision of this question solely upon reason or principle. The great weight of authority sustains this view.

In the case of Meech *v.* Patchin 14 N. Y. 71, Denio, C. J., says:

"It was enacted by the third section of the Laws of 1833, p. 402, that mortgages thus filed should cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless they should be refiled within thirty days before the expiration of the year, with a statement showing the same to be still on foot. A person about to deal with the possessor and apparent owner of chattels, could by resorting to the proper clerk's office, ascertain whether he had mortgaged them to another party. Should he find a mortgage on file, he could not determine, without the help of the third section, whether the lien still continued, whatever length of time had elapsed since the filing; but, by means of the provision in that section, he could be certain
202 that the mortgage had ceased to be a lien, if he found it had not been renewed within one year. If his examination was made within the year, he must proceed at his peril, or take other means to ascertain whether the mortgage remained a lien. When the plaintiffs in this case took their mortgage, the defendant's mortgage was on file, and they accordingly had the notice of it which the statute contemplated. The year from the time it was filed had not elapsed, and no default or want of diligence had, therefore, happened on the part of the defendant. The defendant's mortgage was in full vigor, and the plaintiffs' was taken subject to it. The care which the plaintiffs exercised to file their mortgage, and to preserve its validity by annually refiling a copy, was a suitable precaution

against parties coming after them; but it had not, as I conceive, any effect against the defendant's prior mortgage. The priority of the respective mortgages was fixed as soon as the last one, that of the plaintiffs had been executed. If the controversy had arisen within the year from the filing of the defendant's mortgage, there could not have been any pretense but that the defendant would have had the prior title. Their respective rights having become thus fixed, the diligence or want of diligence of either, as to preserving their liens against subsequent purchasers or mortgagees by refiling their respective mortgages, was of no importance as against each other. This seems to me the necessary construction of the statute, as well from its language as upon its general policy. Its language is: 'Every mortgage filed, etc., shall cease to be valid, etc., against subsequent purchasers or mortgagees, unless it shall, within 30 days before the expiration of the year, be again filed.' 'Subsequent,' I think, means after the time when it ought to be again filed to preserve its validity."

203 In Dillingham *v.* Bolt, 37 N. Y. 198, Justice Parker says: "As against Parmlee, Everts & Co. who purchased before the expiration of the year from the first filing of the mortgage, no refiling with a statement was necessary. It was held in Meech *v.* Patchin, 14 N. Y. 71, that the omission to refile a chattel mortgage, pursuant to the third section of the act on that subject, (Laws of 1883, p. 402) does not render it invalid against purchasers or mortgagees, intermediate the original filing and the ending of the year; and that the term 'subsequent,' in the provision in that section that 'every mortgage filed in pursuance of this act shall cease to be valid as against the creditors of the person making the same or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless' etc., means subsequent to the expiration of the year, that is, after the time of refiling has elapsed." The New York statute is like our own, so far as this question is concerned. In Newman *v.* Tymeson, 12 Wis. 448, the court says: "We think this was erroneous. The section referred to provides that a chattel mortgage, after being properly filed, shall cease to be valid as against the creditors of the mortgagor, or subsequent purchasers or mortgagees in good faith, unless, within thirty days next preceeding the expiration of the year, the mortgagee shall make and annex to it an affidavit setting forth his interest etc. The clear intent of this provision was that, in case of failure to make the affidavit, the mortgage should cease to be valid as against creditors who should thereafter seize it (the property) or purchasers who should thereafter purchase." "If property, covered by a chattel mortgage properly filed, is so taken and converted within the year after the filing as to give the mortgagee a good cause of action for such taking, it is not necessary in order to preserve his right

204 to recover that the action should be commenced within the year from such filing, or that the mortgage should be renewed at the end of the year, as required by statute, to make it valid against

subsequent purchasers or mortgagees." Case *v.* Conroe, 13 Wis. 31. Judge Orton, delivering the opinion in Lowe *v.* Wing, 56 Wis. 33, 12 N. W. Rep. 892, says: "This court has followed the courts of New York in the construction of the above statute for the renewal of chattel mortgages, and has held that 'the clear intent of this provision was that, in case of failure to make the affidavit, the mortgage should cease to be valid as against creditors who should thereafter seize it, (the property) or purchasers who should thereafter purchase it.'" The statute of Wisconsin is the same as ours, except that the limit is two years instead of one. In Edson *v.* Newell, 14 Minn. 228 (Gil. 167) the court says: "In this case more than one year elapsed between the filing of this mortgage and the commencement of this action, and, no copy and statement having been filed as provided for in the statute quoted, the counsel for the defendant insists that the plaintiff cannot recover because the mortgage was not, as against the attaching creditors, in life at the time of the commencement of this action; in other words, because the plaintiff had ceased to have any rights under the mortgage, as against such attaching creditors. But in our opinion this position cannot be sustained. The goods were taken and sold by the defendant before the expiration of one year from the filing of the mortgage, whether since the conversion he has kept his mortgage on foot, by complying with the statute, is unimportant." Again, referring to Corbin *v.* Kincaid, 33 Kan. 552, 7 Pac. Rep. 145, Judge Valentine says:

205 "And all this transpired within less than one year after the execution of the plaintiff's mortgage, and at a time when no one would claim or even pretend that any renewal affidavit was necessary. A cause of action in replevin or conversion then arose in favor of the plaintiff and against the defendant, and that cause of action was not satisfied, annulled, or barred by any failure on the part of the plaintiff to afterwards file a renewal affidavit." Finally the Missouri court has construed our statute, and Judge Hough, in Frank *v.* Playter, 73 Mo. 672, says: "The law of Kansas, in regard to mortgages of personal property, provides that every such mortgage 'shall be void as against creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless within thirty days next preceeding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit.'" etc. The object of the statute requiring this affidavit to be made, was to keep the public informed from time to time as to the condition of the title of incumbered personal property, and to furnish some reliable record evidence by which parties might be guided in dealing with such property. This statute, by its terms, can only be invoked by subsequent purchasers or mortgagees in good faith, that is, by those who become such after the period at which such affidavit should have been made; and creditors of the mortgagor manifestly cannot claim the benefit of its provisions when their claims are asserted before the expiration of

the time prescribed. The plaintiff, however, is neither a subsequent purchaser or mortgagee, nor is he a creditor. It is true he claims through those who were creditors of the mortgagor, but those creditors had asserted their claims, and he had purchased from
206 those claiming under the proceedings instituted by them, while the mortgage was undoubtedly valid, and before any affidavit was required to be filed. The plaintiff having acquired his rights, and brought his suit, while the mortgage was a valid and subsisting incumbrance, against him and those under whom he claimed, his right to recover cannot be aided by the subsequent failure of the defendants to make the affidavit required by law. The rights of the parties had become fixed before the default occurred. Besides, the property had been reduced to possession by the defendants within the year, and that of itself dispensed with the necessity of any affidavit. This view is supported by decisions in New York and Minnesota, where similar statutes are in force. Meech *v.* Patchin, 14 N. Y. 71; Dillingham *v.* Bolt, 37 N. Y. 198; Ely *v.* Carnley 19 N. Y. 196; Porter *v.* Parmley, 52 N. Y. 185; Edson *v.* Newell, 14 Minn. 228 (Gil. 167).

It will be remembered that the first mortgage of the plaintiff below was made December 1, 1884; that all the other mortgages were made during the first half of 1885, and the sheep were taken possession of by Howard, and the Bank of Burrton in the fall of 1885, and within a year from the execution and filing of the first mortgage of the plaintiff below. The right of action for the conversion of the sheep in favor of the plaintiff below, and against the defendant below, accrued during the year from the filing of the mortgage of December 1, 1884. It follows then that, under the law of Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. Rep. 145, the right of action could not be disturbed by a failure to file the renewal affidavit. The plaintiff claims that the mortgage given by Reeder to the Hutchinson bank, December 1, 1884, was satisfied by the mortgage given June 29, 1885, the latter mortgage being given to secure
207 the same debt, and complains of instruction No. 11, given by the court. We think instruction No. 11 is correct, and taken with the thirteenth instruction, gives all the law on the subject. We do not think the taking of a second mortgage to secure the same debt, secured by a first mortgage, upon a renewal of the note, secured by the first mortgage, and upon the same property, operates as a satisfaction and release in law of the first mortgage. "The taking of a new note and mortgage on personal property to secure an indebtedness already evidenced by a note, and secured by a mortgage on the same property, does not, even when the first note and mortgage are cancelled, operate to discharge the lien of such first mortgage." Packard *v.* Kingman, 11 Iowa, 219. "Nothing but payment in fact of the debt, or the release of the mortgage, will discharge a mortgage." Crosby *v.* Chase, 17 Me. 369; Hadlock *v.* Bulfinch, 31 Me. 246. In Gregory *v.* Thomas, 20 Wend. 19, the court says: "But it is said that the defendant's second mortgage extinguished

the first; and consequently, being put to stand exclusively on the last, which was in 1835, the plaintiff's mortgage of the previous September is let in. The argument is against all the books, ancient and modern. Adjudications of several centuries upon such cases, of every variety of form, in England, in this State, and in neighboring States, settle the proposition that a subsequent security for a debt of equal degree with a former, for the same debt, will not, by operation of law, extinguish it." The plaintiff seems to think the defendant lost his rights by not proceeding upon his mortgage when the debt it secured became due. We do not think so. There is no limit to the life time of the mortgage, except such as is put upon it by the statute; otherwise, it will remain until the debt is paid or barred. Morse *v.* Clayton, 13 Smedes & M. 381. We are
208 satisfied no reversible error exists in the record in this case, and therefore recommend that the judgment of the district court be affirmed.

Per Curiam: It is so ordered; all the justices concurring.

209 TERRITORY OF OKLAHOMA, } *ss:*
County of Logan, }

I, Thomas A. Higgins, do hereby certify that I am the official court reporter of the first judicial district court of Oklahoma Territory, of which Woodward county was, at the time of the trial of the above cause, a part; that as such I took a shorthand report of the proceedings in said cause, and that the above and foregoing is a true, full and complete transcript of my shorthand notes taken on the trial thereof, and of the documentary evidence introduced thereon, and especially the opinions introduced in evidence by the defendant, and all other evidence introduced on the trial thereof.

Witness my hand this 25th day of August, 1902.

THOMAS A. HIGGINS,
Court Reporter.

Which said stipulation is indorsed on the back as follows: No. 260. National Live Stock Bank of Chicago, Illinois, *vs.* First National Bank of Geneseo, Illinois. Stipulation. Filed April 18, 1904. —— Kelly, clerk. W. H. O'Brian, deputy.

210 Be it remembered that on the 18th day of April, A. D. 1904, said court being in regular session at the April term, 1904 thereof, at the court house in the city of Woodward in said county, pursuant to an order of the supreme court of said Territory, said day being a regular judicial day of said term, present the Honorable J. L. Pancoast, judge of said court, presiding, E. P. Kelly, clerk of said court, and W. S. Stump, sheriff of said county. The following proceedings were had in said cause in said court and filed, a complete copy of which is in words and figures following to wit:

211 In the District Court of Woodward County, Oklahoma Territory.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant.

Journal Entry.

Now on this 18th day of April, A. D., 1904, it being one of the regular days of the April term, 1904, of the above court, this cause came on for trial before the court without the intervention of a jury, trial by jury having been by agreement of all parties, both plaintiff and defendant, expressly waived. The plaintiff appearing by Winston, Payne & Strawn, and Stanley, Vermilion and Evans, its attorneys, and the defendant appearing by Botsford, Deatherage and Young and Houston and Marum, its attorneys. And thereupon this cause was submitted to the court upon the pleadings, proofs, exhibits and stipulations on file herein, and the court being duly advised in the premises and having heard the argument of counsel for both plaintiff and defendant, finds the issues for the defendant, The First National Bank of Geneseo, Illinois, and against the plaintiff, The National Live Stock Bank of Chicago. And the court finds that under and by virtue of the chattel mortgage mentioned and described in the amended answer of the defendant on file herein, the defendant was at the commencement of this action entitled to the possession of the personal property therein mentioned and described and that the right to and claim of possession of said personal property of the defendant, under and by virtue of said chattel mortgage was at the commencement of this action, prior and superior to the right and claim of and to the possession thereof by the plaintiff,

212 The National Live Stock Bank of Chicago, under and by virtue of its chattel mortgage mentioned and described in its petition and amended petition on file herein. And the court further finds that under and by virtue of the order of delivery issued in this action, the sheriff took from the possession of the defendant three hundred seventy-four (374) head of cattle mentioned and described in the defendant's amended answer and in defendant's said mortgage, and that there were in existence at the time of the commencement of this action one hundred and twenty-six (126) head of cattle which were in defendant's possession and were covered by defendant's mortgage in addition to those so taken possession of by the sheriff as aforesaid, and that plaintiff also took from defendant said 126 cattle. And the court further finds that by virtue of the agreement of the parties heretofore made in this action, the right to the possession of the said one hundred and twenty-six head of said cattle, as well as the right to the possession of the three hundred

and seventy-four head so taken by the sheriff, as aforesaid, was to be tried and determined by this action. And the court further finds that at the commencement of this action and that at the time when the sheriff took possession of said cattle as aforesaid, the said five hundred (500) cattle were of the fair and reasonable market value of twenty-four ($24.00) dollars per head. To all of which findings of the court the plaintiff at the time duly objected and excepted, and still objects and excepts.

It is therefore by the court considered, ordered and adjudged by the court that at the commencement of this action the defendant was entitled to the possession of the said five hundred (500) head of cattle mentioned and described in its amended answer, and that the said defendant have and recover judgment against the
213 said plaintiff for the return of said personal property, or in the event said personal property cannot be returned, for the fair and reasonable market value of said property to wit: twelve thousand ($12,000.00) dollars, with interest at the rate of seven per cent. (7%) from the 28th day of May A. D. 1901.

The court further finds that said five hundred head of cattle have been sold by plaintiff and cannot be returned to defendant, and that defendant is entitled to judgment against plaintiff for said sum of twelve thousand dollars and interest, as aforesaid, to this day:—

Wherefore, it is considered, ordered and adjudged by the court that defendant The First National Bank of Geneseo, Illinois, have judgment for and recover from the plaintiff, The National Live Stock Bank of Chicago, Illinois, the sum of fourteen thousand four hundred and seventeen and 33/100 ($14,417.33) dollars, the principal and interest aforesaid with the costs of this action, and that execution issue therefor. This judgment bears interest at the rate of seven per cent. (7%) per annum.

And it is further ordered that the plaintiff pay the costs of this action taxed at $163.35 *dollars* to which action of the court in rendering said judgments, the plaintiff at the time duly objected and excepted, and still objects and excepts.

And thereafter and on to wit: the 18th day of April, A. D., 1904, within three days of the time when said cause was submitted to the court, as aforesaid, and on the same day, and at the same term of the above court, this cause comes on for further hearing upon the motion of the plaintiff to set aside the findings, decision and judgment of the court herein, and to grant the plaintiff a new trial of this action, the parties appearing as before, and said motion
214 having been duly submitted to the court and argued by counsel for both the plaintiff and defendant, and by the court fully considered, the court finds that said motion should be, and the same is hereby overruled. To which action of the court in overruling said motion for a new trial the plaintiff at the time duly objected and excepted, and still objects and excepts.

And thereupon, for good cause shown, and upon the application of the plaintiff in writing therefor, it is ordered that the time for

making and serving of case made herein, be, and the same is hereby extended, and that the plaintiff be, and it is hereby given thirty (30) days from this date in which to make and serve a case made for the supreme court of Oklahoma Territory upon the defendants herein. And it is ordered that said defendant have ten (10) days thereafter in which to suggest amendments in writing, and that said case made be thereafter settled upon five (5) days' notice in writing. And it is further ordered that execution be stayed upon the judgment hereinbefore rendered for the period of fifty (50) days from this date.

J. L. PANCOAST, Judge.

Approved:—
WINSTON, PAYNE & STRAWN,
STANLEY, VERMILION AND EVANS,
Attorneys for Plaintiff.
BOTSFORD, DEATHERAGE & YOUNG,
HOUSTON & MARUM,
Attorneys for Defendant.

215 Be it further remembered that on said 18th day of April, A. D. 1904, there was filed in the office of the clerk of said court in said cause a motion, a true, full and complete copy of which is in words and figures following, to wit:

In the District Court of Woodward County, Oklahoma Territory.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant.

Motion for a New Trial.

Comes now the plaintiff in the above entitled action and moves the court to set aside and vacate the decision heretofore rendered by the court and to grant this plaintiff a new trial therein, upon the following grounds, to wit:

1. Irregularity in the proceedings of the court and of the defendant, and abuse of discretion of the court, by which the plaintiff was prevented from having a fair trial.
2. Misconduct of the jury and of the defendant.
3. Accident and surprise which ordinary prudence could not have guarded against.
4. Excessive damages appearing to have been given under the influence of passion or prejudice.
5. Error in the assignment of the amount of recovery, the same being too large.
6. That the said decision is not sustained by sufficient evidence and is contrary to law.

7. Newly discovered evidence material for the plaintiff, which it could not, with reasonable diligence, have discovered and produced at the trial.

216 8. Errors of law occurring at the trial and excepted to by the plaintiff.

WINSTON, PAYNE & STRAWN,
STANLEY, VERMILION AND EVANS,
Attorneys for Plaintiff.

Said motion was endorsed as follows, to wit: No. 260. National Live Stock Bank of Chicago *vs.* First National Bank of Geneseo, Illinois. Motion for a new trial. Filed April 18th, 1904. E. P. Kelly, clerk. By W. H. O'Brian, deputy.

TERRITORY OF OKLAHOMA, } ss:
County of Woodward, }

I, Ed Kelly, clerk of the district court of said county, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof, I have hereunto set my hand and seal this 18th day of April, 1904.

[SEAL.]

E. P. KELLY, Clerk,
By W. H. O'BRIAN, Deputy.

Filed June 1, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

217 In the District Court of Woodward County, Oklahoma Territory.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant.

To Messrs. Botsford, Deatherage and Young and Houston and Marum, attorneys for the defendant, The First National Bank of Geneseo, Illinois:

Please take notice that the above and foregoing is presented and served on and delivered to you as a full, true and perfect case made in the above entitled cause, and that the same contains all of the pleadings, motions, orders, judgments, and endorsements of the court or judge, and the objections and exceptions of the parties and the evidence offered, tendered or heard on the trial and hearing thereof, together with the rulings and decision of the court thereon, and the objections and exceptions of the parties thereto, and all of the orders

of the court or judge and journal entries relating thereto, and all of the stipulations and agreements of the parties and of their counsel, the evidence so offered being full and complete and said case made contains the full statement of all the evidence offered by the plaintiff and defendant, and contains all of the proceedings of every kind and nature whatsoever that have taken place in said cause, and also contains a full statement of everything that transpired in the trial, and said case made is a full, true and perfect case made upon all the issues and questions in said case.

Dated this 18th day of April, A. D., 1904.

WINSTON, PAYNE & STRAWN AND
STANLEY, VERMILION & EVANS,
Attorneys for Plaintiff, The National Live Stock
Bank of Chicago, Illinois.

Filed, June 1, 1904,
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

218 We have examined the above and foregoing case made and find it to be true and correct, and we therefore have no amendments to suggest. We hereby waive notice on us of the time and place when and where the same will be presented to the judge of the above court for signing and settlement, and we do hereby consent that this case made may be presented in our absence by the plaintiff to the judge of said court for settlement, and that the same may be by him signed and settled in our absence, and certified, attested and filed as a correct case-made in the above entitled action.

Dated this 18th day of April, A. D. 1904.

BOTSFORD, DEATHERAGE AND YOUNG AND
HOUSTON AND MARUM,
Attorneys for Defendant, The First National
Bank of Geneseo, Illinois.

Filed June 1, 1904,
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

Service of the above and foregoing case made upon, and acknowledged by, us this 18th day of April, A. D. 1904.

BOTSFORD, DEATHERAGE AND YOUNG AND
HOUSTON AND MARUM,
Attorneys for Defendant, The First National
Bank of Geneseo, Illinois.

Filed June 1, 1904,
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

219 I, the undersigned judge of the district court of Woodward county, Oklahoma Territory, hereby certify that the above and foregoing was presented to me as a case made in the cause above entitled at the town of Woodward, county of Woodward, Oklahoma Territory, and that there appeared R. R. Vermilion, attorney for and on behalf of the plaintiff, The National Live Stock Bank of Chicago, and it appearing to me that the attorneys for the defendant, The First National Bank of Geneseo, Illinois, have waived the issuance and service of notice of the time and place of settling, signing, serving, filing, attesting and certifying to this case made, and it further appearing that the foregoing case made was duly made and served as provided by law and the order of the court herein and the order of the undersigned judge, and that defendant has no suggestions of amendments and has consented that this case made may be settled, signed, certified, attested and filed as a correct case made and said case made having been by me duly examined and found to be correct, I do now hereby allow, settle, approve, certify and sign the same as a true and correct case made in the above entitled action, to the *direct* that it be attested, certified and filed by the clerk of the district court of Woodward county, Oklahoma Territory, and that the seal of said court be thereto affixed. And I further certify that the amount involved in this action, exceeds the sum of fourteen thousand dollars, exclusive of interest and costs.

Witness my hand at the town of Woodward, Woodward county, Oklahoma Territory, this 18th day of April, 1904.

J. L. PANCOAST,
District Judge.

Attest:
E. P. KELLY, Clerk,
By W. H. O'BRIAN, Deputy.

Filed June 1, 1904.

[SEAL.]

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

(Endorsement:) No. 1541. National Live Stock Bank of Chicago, Illinois, *vs.* First National Bank of Geneseo, Illinois. Filed
220 April 19, 1904. E. P. Kelly clerk, by W. H. O'Brian, deputy. Petition in error and case made. Filed June 1, 1904. Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

221 And thereafter, at the January, 1905, term of said supreme court, on the third day of January, 1905, the following proceeding was had in said cause, to wit:

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant in Error. } # 1541.

Ordered by the court that this cause be now taken on record and briefs.

222 And thereafter, at the January, 1905, term of said supreme court, on the eleventh day of January, 1905, the following proceeding was had in said cause, to wit:

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant in Error. } # 1541.

And now this cause comes on for final decision and determination by the court upon the record and briefs submitted therein.

And the court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by Burwell, J. All the justices concurring except Pancoast, J., who tried the cause below, not sitting, Burford, C. J., not participating, and Beauchamp, J., absent.

Which opinion reads in words and figures as follows:

223 In the Supreme Court of the Territory of Oklahoma, January Term, 1905.

Filed February 11, 1905.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant in Error. } No. 1541.

Error from the District Court of Woodward County—J. L. Pancoast, Trial Judge—Affirmed.

Winston, Payne & Strawn, Stanley, Vermilion & Evans and Geo. S. Green, for plaintiff in error.
Botsford, Deatherage & Young and Houston & Marum, for defendant in error.

Opinion of the court by BURWELL, J.:

This case was originally tried in the district court of Woodward county, and judgment rendered in favor of the National Live Stock Bank of Chicago. The First National Bank of Geneseo appealed, and this court reviewed the record, and promulgated an opinion, in which it made a full statement and findings of facts, and enunciated the law as applied thereto, reversed the judgment of the lower court, and remanded the case, directing a new trial—76 Pac. 130.

On the second trial in the lower court it was agreed between the parties that a jury be waived, and the case submitted on the record, as made on the first trial.

Judgment was rendered in favor of the Geneseo bank, and the Chicago bank appeals to this court. No new question is raised on this appeal. The record is the same as stated in our former opinion, and we are fully satisfied with the law as therein declared.

The judgment of the lower court is hereby affirmed at the cost of the appellant. All of the justices concurring, except Pancoast, J., who presided at the trial below, not sitting, and Burford, C. J., not participating, and Beauchamp, J., absent.

224 The opinion of said supreme court referred to in the preceding opinion of said court and reported in 76th Pacific Reporter 130, is in words and figures as follows, to-wit:

225 In the Supreme Court of the Territory of Oklahoma, January Term, 1904.

Filed Mar. 4, 1904.

THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Plaintiff in Error,
vs.
THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Defendant in Error.
} No. 1294.

Syllabus.

Replevin—Assignment of Chattel Mortgage—Not Necessary to Record Acknowledgment of Release—Assignees and Incumbrances in Good Faith—Penal Statutes.

Sec. 9 of chapter 120, vol. 2, of Webb's Annotated Statutes of Kansas, which provides that, "where any mortgage of personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagor, his assignee or personal representative, to enter satisfaction, or cause satisfaction thereof to be entered, of record, in the same manner as near as may be, and under the same penalty for a neglect or refusal, as provided in the case of the satisfaction of mortgages of real estate," does not authorize or require one who purchases a negotiable promissory note, which is duly transferred by an assignment on the back thereof, before maturity, to also take a formal assignment of a chattel mortgage given to secure it, and have it filed in the office of the register of deeds. The transfer of such note carries with it the assignment of the mortgage, there being no law authorizing an assignment of a chattel mortgage, given to secure negotiable paper, to be placed of record; and such assignee, although he has no record title, will be protected against subsequent purchasers and incumbrancers in good faith, and may recover against them in a replevin action involving the property included in his mortgage.

A separate instrument executed by a mortgagee acknowledging satisfaction of a chattel mortgage and payment of the debt secured thereby, but which is not acknowledged before some officer named in the statute and certified to as provided therein, is not entitled to record, and the filing or recording thereof imports no notice.

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Duties imposed by implication are only those which are necessarily connected with the subject to which the statute relates, and, if they are penal, they are to be construed strictly, which means that they are not to be so extended by implication be-

yond the legitimate import of the words used in them as to embrace acts not clearly described by such words.

The mere fact that a mortgage in Kansas, in the absence of a contract to the contrary, owns the legal title to the property mortgaged, does not require an assignment of such mortgage to be placed of record, there being no statute imposing such duty.

Error from the District Court of Woodward County—John H. Burford, Trial Judge—Reversed and Remanded.

Botsford, Deatherage & Young, and Houston & Marum for appellants.

Winston, Babcock, Strawn & Shaw, and Stanley, Vermilion & Evans for appellee.

227 Opinion of the court by BURWELL, J.:

W. B. Grimes, who lived in Clark county, Kansas, on June 27, 1900, executed to Siegel-Sanders Live Stock Commission Company his negotiable promissory note for $11,111.23, due November 1st, 1900, with interest from maturity at the rate of 8 % per annum. To secure the payment of this note, at the same time, he duly executed a chattel mortgage to the payee of the note, on five hundred and twenty six cattle, and this mortgage was filed in the office of the register of deeds of Clark county on July 12, 1900. This note was then assigned by the payee to the Geneseo bank.

On October 24, 1900, and after the note just described had been assigned to the Geneseo bank, Grimes executed to Siegel-Sanders Live Stock Commission Company two other notes, one for $7,033.24 and one for $7000.00, due six months after date, and gave a chattel mortgage to the commission company on 633 head of cattle (which included the cattle described in the first mortgage) to secure these two notes, which were assigned to the Chicago Cattle Loan Company.

On November 24th, 1900, although the Siegel-Sanders Live Stock Commission Company had sold the note for $11,111.23 to the Geneseo bank, it, through its president, Frank Siegel, without any authority, filed in the office of the register of deeds a pretended release, in which payment of the note was acknowledged.

On February 25th, 1901, the Chicago Cattle Loan Company caused its agent, a Mr. True, to examine the records of Clark county as to chattel mortgages against Grimes, and upon this examination he found the record clear, except as to the mortgage held by his company, and so reported to it. On April 17, 1901, Grimes executed
228 two other notes to Siegel-Sanders L. S. Com. Co., for $7,694.77 each, due October 27, 1901, and to secure the payment of these two notes, he, at the same time, executed a chattel mortgage on 606 of the cattle in question. These two notes were then sold to the National Live Stock Bank of Chicago for $15,389.54, and it be-

lieved at the time it bought these notes that the mortgage securing them was a first lien on the cattle, and it secured this information through Mr. True, who personally examined the record. It is insisted that these notes were given as a renewal of the second set of notes taken by the Siegel-Sanders Co., but perhaps that is not material under our view of the law.

Grimes moved these cattle to Woodward county, Oklahoma, between April 25th and May 1st, 1901, without the knowledge or consent of either of the parties to this suit. They were seized by the Geneseo bank between the 19th and 20th of May, 1901, and the Chicago bank, within one year from the filing of the first mortgage in the office of the register of deeds of Clark county Kansas, commenced this suit in replevin in the district court to recover possession of the cattle, claiming under the mortgage which was executed to the Siegel-Sanders L. S. Com. Co. on April 17th, 1901; and the Geneseo bank claiming under the mortgage dated June 27th 1900, which was released by the Siegel-Sanders L. S. Com. Co. after its assignment to the Geneseo bank. There is practically no dispute as to the facts; and the trial court expressly held that both the parities to this action acted in good faith. It was agreed that the court should take into consideration all of the laws of Kansas, the same as though they had been formally introduced in evidence and copied into the record; and as each party is still insisting upon this agreement, this court will adhere to it.

A number of questions are argued in the briefs, and while we will not discuss all of them, we have considered them all, and
229 will discuss those which we think are controlling.

The note dated June 27th, 1900 was assigned to the Geneseo bank for value in the ordinary course of business long before maturity, and this assignment of the note carried the security with it, without the execution of a formal assignment of the mortgage.—Burhans *v.* Hutcheson, 25 Kans. 625; Mutual Benefit Life Insurance Company, *et al. v.* Huntington, 57 Kans. 744, 48 Pac. 19; Swift *v.* Bank of Washington, 104 Fed. 643; Daniels on Negotiable Instruments, vol. 2, sec. 655; Jones on Chattel Mortgages, sec. 503. And in the case of Carpenter *v.* Logan, 16 Wall. 271, the Supreme Court of the United States said: "All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principal of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. *The mortgage can have no separate existence.* When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration and takes the

case out of the rule applied to choses in action, where no such relation of dependence exists." It follows therefore that the Siegel-Sanders Live Stock Commission Company had no legal or moral right to release the mortgage securing the note which it had assigned to the Geneseo bank. And the execution and filing of the purported release was a fraud upon that bank. That bank never ap-
230 pointed the Siegel-Sanders Company its agent to collect this money, nor did that company have any express or implied authority to do so, or to release the chattel mortgage which secured the same.

It is true that the Siegel-Sanders Company is not a party to this suit, and that it has had no opportunity to be heard or make any explanation as to its connection with the transaction; still the court must take the record as presented, and determine the rights of the parties therefrom; and even if that company thought it had a right to release the mortgage, and intended to apply the proceeds of the second loan to the payment of the first, its belief in the premises would not change the law, nor do its acts in failing to apply the proceeds of the second loan to the payment of the first argue good intentions. But it is insisted that it is immaterial as to whether the Siegel-Sanders Company acted in good faith, or had authority for executing the release of the Geneseo mortgage; that it was the duty of the plaintiff in error when it bought its note from the Siegel-Sanders Company to also take and file an assignment of the mortgage securing it, and that, by not doing so, the Geneseo bank was guilty of negligence, and that the Chicago bank having bought on the record as it found it, has a better right than the appellant, and counsel cites a long list of cases to support this position; in fact the array is so formidable, were it to be conceded that the statutes of Kansas require the transfer of a chattel mortgage given to secure the payment of a negotiable promissory note to be evidenced by a formal assignment duly filed or recorded, we would readily admit this position, if the release filed were in form and executed as required by law; but after an examination of the laws of Kansas we are fully persuaded that they neither contemplate nor require it; and
231 it is universally admitted that the registration of an assignment of a mortgage is wholly the creature of statute, and if the statute does not require an assignee to record his assignment, he is not guilty of negligence in failing to do so.—Jones on Mortgages, (5th ed.) vol. 1, sec. 956. The formal assignment and transfer of the note is all that is neccssary. The appellee, in support of its position, calls attention to section 9, of chapter 120 of Webb's Annotated Statutes of Kansas, which relate to the release of chattel mortgages, and is as follows: (Vol. 2) "When any mortgage of personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, his assignee or personal representative, to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be, and under the same penalty for a neg-

lect or refusal as provided in the case of the satisfaction of mortgages of real estate."

This section has been commented upon by the supreme court of Kansas, but, as applied to the question now under consideration, we have been unable to find any decision of that State which can be considered as an interpretation of it. In the case of Thomas *v.* Reynolds, 29 Kans. 304, Justice Brewer said that the statute in question had reference to one who had record title, and that the purpose of the statute was to clear the record title of the property, and that, where a mortgage has been assigned, no action, under the statutes, will lie against the assignee to recover the penalty without proof of an assignment of record. The penalty referred to is a penalty of $100, provided for in the chapter on real estate mortgages, to be recovered against a mortgagee or his assignee for failure to release a mortgage after the same has been paid. It reads as follows: "When any mortgage of real property shall have been satisfied, it shall be the duty of the mortgagee or his assignee, immediately on de-
232 mand of the mortgagor, to enter satisfaction, or cause satisfaction of such mortgage to be entered, of record; and any mortgagee, or assignee of such mortgage, who shall neglect or refuse to enter satisfaction of such mortgage, as is provided by this act, shall be liable to damages to such mortgagor, or his grantee or heirs, in the sum of one hundred dollars, to be recovered in a civil action before any court of competent jurisdiction."

The defendant was the assignee of a chattel mortgage, and, after payment, he refused to release it, and the court, the question being raised and urged, simply held that the statute referred to one holding record title. The court did not consider as to whether the assignee of a chattel mortgage should place his assignment of record; that question was not before the court, and the mere fact that it disposed of all of the questions raised is no indication as to how it would have held on the one question, which might be decided either way so far as any principle announced in the opinion was concerned. The court in that case was considering who was liable, under the statute, for failure to execute a release of a chattel mortgage, and not whether the statute required an assignment of such a mortgage to be filed or recorded. For the sake of argument it may even be admitted that the opinion assumes that an assignment may be placed of record; still that would not be controlling, because that question has never been decided in Kansas, nor was it in any way suggested in the record; and the court decided the case as presented, leaving questions not raised for future consideration. The other case, Parkhurst *v.* First National Bank of Clyde (Kans.), 35 Pac., 1116, follows the rule announced in the case of Thomas *v.* Reynolds, *supra*, and nowhere even refers to the question before us.

The only provision of the statutes of Kansas which counsel
233 for the Chicago bank contend authorize the filing of an assignment of a chattel mortgage is the one above quoted relating to this release, and all they contend for it is that "its

provisions clearly contemplate the making and recording of an assignment." The statute is penal in its nature.—Parkhurst *v.* First National Bank of Clyde, *supra*. And penal statutes are always strictly construed, no matter whether they relate to public crimes or forfeitures to individuals in the way of fixed damages, or damages to be *be* assessed by a jury.

It has been said that "the rule requiring penal statutes to be construed strictly, means only that they are not to be so extended, by implication, beyond the legitimate import of the words used in them, as to embrace cases or acts not clearly described by such words, and so as to bring them within the prohibition or penalty of such statutes." We know of no authority to the contrary. No act not included within the wording of the statute can be inferred. The application to the statute in question is clear. It relates to the release of the chattel mortgage, and not to the filing of the assignment of it. No words used therein expressly authorize an assignment to be filed, nor can it be said to do so by implication. And even if it be said that the statute recognizes the right or duty to have an assignment placed of record, we insist that such an assumption in a penal statute does not impose the duty or create the right. Duties imposed by implication are those which are necessarily connected with the subject to which the statute relates, and it is certainly clear that a general statute which makes it the duty of an assignee of a mortgage to release it, does not, by reason of the imposition of that duty alone, authorize him to record it.

The appellee has cited many cases, but our attention has
234 not been directed to a single one bearing on this question, where the assignment of a chattel mortgage was involved, notwithstanding it is one of the controlling points in the case, and has been so treated and admitted by both parties from the beginning of the trial below. It is safe to assume that none exist.

The statutes of Oregon (Hill's Code, sec. 3031) provide that a mortgage may be discharged upon the record thereof by the mortgagee or his personal representative or assignee acknowledging satisfaction of the mortgage before the clerk, or executing a certificate to that effect with the formalities of a deed, and presenting the same to the clerk. Then, sec. 3030 of the same statute provides that the recording of the assignment of a mortgage shall not, in itself, be notice to the mortgagor so as to invalidate a payment made by him to the mortgagee.

The supreme court of Oregon, in the case of Bomberger *v.* Geiser, 33 Pac., 609, in passing upon the question as to whether the statutes authorized the recording of an assignment, following a former decision of that court, said, that a thorough consideration of the subject, rendered necessary by the facts in that case, had satisfied it that the recording acts of that State do not extend to the assignment of mortgages, and then declared that: "the question is not what the plaintiffs might have done to apprise the defendant grantees that they were incumbrancers, but what they were legally bound to do

in order to preserve the priority of their lien against the subsequently acquired rights of the defendants in the property. As the plaintiffs were not bound, under the recording acts, to register their assignment, they were under no legal obligations to take the assignment of the mortgage in the form of a conveyance, and record it, in order to prevent a fraudulent discharge on the record, or to protect subsequent grantees or mortgagees."

The case above referred to is squarely in point, although it
235 relates to a real estate mortgage; but that is immaterial, as the section there construed contained the same provisions as the one we are called upon to interpret, except that it was stronger by reason of the other statute relating to the filing of an assignment of mortgages.

The supreme court of Indiana, in the case of Reeves, guardian, *vs.* Hayes *et al.*, 95 Ind., 521, considered the question in relation to the assignment of a real estate mortgage. The statutes of that State of 1876 contained the following provision: "Every conveyance or mortgage of land, or of any interest thereon * * * shall be recorded," etc.

"To entitle any conveyance, mortgage or instrument of writing to be recorded, it shall be acknowledged by the grantor."

"When any conveyance, mortgage or other instrument required to be recorded, is acknowledged," etc.

"The term 'grantor' as used in this act shall be construed to embrace every person by whom any estate or interest in lands is created, granted, bargained, sold, conveyed, transferred or assigned."

"All instruments of writing of and concerning lands or concerning any interest therein * * * shall be deemed a conveyance within the provisions of this act."

"The recording of the assignment of a mortgage shall not be deemed, of itself, notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them to the mortgagee or any assignee before actual notice of such assignment."

But in the face of all of these statutory provisions, one of which relates to the recording of the assignment of a mortgage, the court said that there was no law authorizing the record of the assignment of a mortgage, and that, by reason thereof, such record, if made, would not import notice to subsequent purchasers or mortgagees in good faith.

As to the correctness of this decision we express no opinion,
236 but it shows how reluctant the courts are to invade the domain of negotiable paper and impair its usefulness in commerce and banking transactions, by holding that assignments of mortgages given to secure it must be recorded when there is no positive statute requiring such record. Dealing in commercial paper is the purpose of our banking system, and there is no rule of law more thoroughly settled than that which protects a purchaser of such paper in good faith, before maturity, against equities not known to him; this is necessary to inspire faith in it as security; and we

are unwilling, unless required by positive statute, to adopt a rule which will place upon that class of negotiable instruments, secured by chattel mortgage, a restriction which will compel its retirement, except in the county where the mortgage is filed, from the channels of trade; and such would be the effect, for no person would invest his money under such circumstances, without either examining the record himself or having them examined by some responsible party. This would entail delay and expense. The courts should not, by reason of uncertain implications of statutes, destroy the market for negotiable paper, or a considerable part of it, any more quickly than they would destroy a market for the great commerce of the country. The protection of the one is as essential as the other, and this was recognized by the supreme court of Kansas in the case of Burhans *v.* Hutcheson, 25 Kans. 625; and it will not do to say that the note still remains negotiable, for while that is true in theory it is not true in fact. That alone which guaranteed its payment has virtually been withdrawn leaving the note with no power in trade. The legislature have the right to require that an assignment of a chattel mortgage be filed, but it has not done so; neither do we.

But even if the statutes authorize such a course, the Chicago bank is in no position to complain, because the release filed did not meet the requirements of the law. Section 9 of chapter 120
237 of vol. 2 of Webb's Annotated Statutes provides how a chattel mortgage must be released. It is as follows: "When any mortgage of personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, his assignee or personal representative, to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner, as near as may be, and under the same penalty for a neglect or refusal, as provided in case of the satisfaction of mortgages of real estate."

Sections 6 and 7 of chapter 119 of the same statute, states how a real estate mortgage may be discharged. Section 6 reads: "Any mortgage of real property that has been or may hereafter be recorded may be discharged by an entry on the margin of the record thereof, signed by the mortgagee or his attorney, assignee or personal representative, acknowledging the satisfaction of the mortgage in the presence of the register of deeds or his deputy, who shall subscribe the same as a witness. A mortgage may be released by a receipt indorsed thereon, signed by the mortgagee, his agent or attorney, which receipt may be entered on the margin of the record and shall have the same force and effect as the entry on the margin of the record as provided in this section."

And section 7 reads: "Any mortgage shall also be discharged upon the record thereof by the register of deeds whenever there shall be presented to him an instrument acknowledging the satisfaction of such mortgage, executed by the mortgagee, his duly authorized attorney-in-fact, assignee, or personal representative, and duly acknowledged and certified as other instruments affecting real estate."

It will be seen that the Siegel-Sanders Company attempted to release the Geneseo bank's mortgage in the manner pointed out by section 7, which provides that a release shall be duly "ac-
238 knowledged and certified as other instruments affecting real estate;" and sections 9, 10 and 12 of chapter 117 of the same statutes inform us as to how that acknowledgment shall be made. They are as follows:

"SEC. 9. All deeds and other conveyances of lands or of any estate or interest therein shall be subscribed by the party granting the same or by his lawful agent or attorney, and may be acknowledged or proved and certified in the manner herein prescribed."

"SEC. 10. All conveyances and other instruments affecting real estate, acknowledged within this State, must be acknowledged before some court having a seal, or some judge, justice or clerk thereof, or some justice of the peace, notary public, county clerk, or register of deeds, or mayor or clerk of an incorporated city."

"SEC. 12. The court or officer taking the acknowledgment must endorse upon the deed a certificate showing in substance the title of the court or officer before whom the acknowledgment is taken; that the person making the acknowledgment was personally known to the court, or to the officer taking the acknowledgment, to be the same person who executed the instrument, and that such person duly acknowledged the execution of the same."

The release filed was in the following form:

"In consideration of the payment of the debt secured thereby, we the Siegel-Sanders Live Stock Commission Company, of Kansas City, Missouri, do hereby release, cancel and finally discharge the deed of trust or mortgage No. 604, covering 526 head of cattle branded, bar on left thigh; given by W. B. Grimes, Jr., to secure the payment of eleven thousand one hundred eleven & 23/100 dollars, which said deed of trust or mortgage was dated 6-27-1900, and recorded in the office of the recorder of deeds of Clark county, State of Kansas, in Book —, at page —. Witness the sig-
239 nature of this company this 24th day of November, A. D. 1900.

SIEGEL-SANDERS LIVE STOCK COMMISSION COMPANY.

(Seal of Company.) FRANK SIEGEL, P't. [SEAL.]

It will be seen that the release was not acknowledged. There was no attempt to comply with the statute. Without the certificate of a duly authorized officer attached thereto showing that the maker thereof had acknowledged its execution, it was not entitled to record, and not being entitled to record, it was not constructive notice to anyone. And even if the Chicago bank had examined this release, it was bound to know that it was not in form and would not be binding, except as between Grimes and the Siegel-Sanders Company. As between them it was simply an acknowledgment of the payment of the debt. The Statutes of Oklahoma require that a chattel mort-

gage must be signed by the mortgagor in the presence of two witnesses, who must sign the same; and the court held in the case of Greenville National Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 359, that a chattel mortgage not signed by two witnesses was not entitled to be filed, and that the fact that the register of deeds filed it gave it no force or effect which it would not have had without such filing. Requirements imposed by statute as to the execution of an instrument are necessarily to be complied with or it will not give constructive notice even if placed of record. This view is sustained by the Kansas courts. In the case of Fisher, *et al. v.* Cowles, 21 Pac. 228, it was held that an assignment of a real estate mortgage not duly acknowledged, even when made on the back of the original mortgage, was an instrument not authorized to be recorded; and then the court said: "It (the assignment) being placed there (on the back of the mortgage) gave it no greater validity for record than if placed
240 upon another paper. The law does not intend that such a paper shall be recorded and therefore the spreading it upon the public records would not give constructive notice of its contents. As the assignment was not acknowledged as provided by section 11, it should not have been recorded and, being spread upon the public records without authority of law, it imparted no notice whatever." And this is the general rule.—Jones on Chattel Mortgages (3rd ed.) sec. 248. This point is well settled by many adjudicated cases.

It is true that the appellee on the trial of the case proved by an attorney from Kansas that under the law of that State a release of a chattel mortgage, when made on a separate instrument, did not have to be acknowledged; but this testimony was a mere conclusion, and is not controlling as to that question. It was agreed between the parties that, in order to avoid the "expense of taking evidence to prove the laws of Kansas" relative to this case, each party might use the statutes and decisions of that State. This agreement authorized the court to consider the statutes and decisions of Kansas, and both parties have so treated it in their briefs, and, recognizing the agreement, we have interpreted these statutes and defined the rights of the parties thereunder.

One other reason urged for the necessity of filing an assignment of a chattel mortgage is that, under the mortgage laws of Kansas, the mortgagee is the owner of the legal title, and entitled to possession of the property; and that the purpose of the registration laws is to notify the world that while the property is in the possession of the mortgagor, the legal title is in some one else. This contention is only partially true. In the absence of a stipulation to the contrary, a mortgagee has the legal title, and the right to pos-
241 session. Sec. 8 of chap. 120 of Webb's Annotated Statutes provides: "In the absence of a stipulation to the contrary the mortgagee of personal property shall have the legal title thereto and the right of possession." From this statute it will be seen that it is only in the absence of express contracts that the mortgagee is the owner of the legal title or, as a matter of right, may claim pos-

session before the conditions are broken. In the mortgage under consideration, by agreement therein, the mortgagee at least waived the right of possession. But we submit that, under the laws of Kansas, a chattel mortgage is merely a security, and the only way the rights of the mortgagor can be cut off is by foreclosure. The equities of the mortgagor are not cut off by default. Conceding, however, that the mortgagee had the legal title, the statute as to recording had been fully complied with, and nothing further was required.

The books are full of cases holding that the assignment of a deed of trust or a real estate mortgage must be recorded or the assignee will not be protected against subsequent purchasers and incumbrancers in good faith, but in every one of these cases, so far as we have been able to investigate, the courts held that the statutes on the subject of recording were sufficiently comprehensive to include such instruments.

The Geneseo bank did all that the law required it to do, and acted in good faith; while the Chicago bank accepted a second mortgage on the cattle at the time when the Geneseo bank's mortgage in law, was unreleased, and it was chargeable with the condition of the record at the time it bought its notes.

For the reasons herein stated, we think that, not only the equities (the Geneseo bank being first in time, conceding that both
242 acted in good faith) but the law is with the appellant, and that the judgment should be reversed and remanded at the cost of the appellee. It is so ordered; all of the justices concurring, except Burford, C. J., who presided at the trial below, not sitting.

243 UNITED STATES OF AMERICA, } ss.:
Territory of Oklahoma, }

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the opinion in the cause of The First National Bank of Geneseo, Illinois, plaintiff in error, *vs.* The National Live Stock Bank of Chicago, Illinois, defendant in error, No. 1294, which opinion was rendered by said supreme court at the January, 1904, term, on the 4th day of March, 1904.

In witness whereof, I hereto set my hand and affix the seal of said supreme court, at Guthrie, this 12 day of May, 1905.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk Supreme Court, Oklahoma.

244 Be it remembered: that on the sixth day of May, 1905, there was filed in said court a petition for a writ of error and assignment of errors in words and figures following, to-wit:

245 In the Supreme Court of the Territory of Oklahoma.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, Illinois, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, Illinois, Defendant in Error.

Petition for Writ of Error with Assignments of Error at Law.

Comes now the plaintiff in error, The National Live Stock Bank of Chicago, Illinois, and says:

That on the 11th day of February, 1905, this court entered judgment herein in favor of the defendant in error and against this plaintiff in error affirming the judgment and decision of the lower court in favor of the said defendant in error and against this plaintiff in error, in which said judgments, orders, decrees and proceedings had therein and in relation thereto and the judgment of the court below so affirmed by the judgment and decree of this court in this cause, certain errors were committed to the prejudice of this plaintiff in error all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in its behalf to the supreme court of said Territory for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States.

The plaintiff in error further in its behalf shows that the amount in controversy in this cause exclusive of interest and costs exceeds the sum or amount of five thousand dollars ($5000.00) and is of about the sum and amount of fourteen thousand dollars
246 ($14,000.00), as more fully appears by the transcript of the record of said cause.

WINSTON, PAYNE & STRAWN,
STANLEY, VERMILION & EVANS,
Attorneys for Plaintiff in Error.

TERRITORY OF OKLAHOMA, County of Logan, } ss:

Earle W. Evans being first duly sworn according to law on his oath says: I am one of the attorneys for the plaintiff in error; that I am familiar with the controversy involved in this cause and know the amount at issue therein and involved therein and of controversy therein, and know the amount of controversy of said cause exclusive of interest and costs to exceed the sum of five thousand dollars ($5,000) and to be of about the sum of fourteen thousand dollars ($14,000.00), as more fully appears by the record in this cause which is hereby referred to.

EARLE W. EVANS.

Subscribed and sworn to before me this 6th day of May, A. D., 1905.

BENJ. F. HEGLER,
Clerk Supreme Court, O. T.

[SEAL.]

Said petition is endorsed: No. 1541—The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error—Petition for writ of error—Filed May 6, 1905, Benj. F. Hegler, clerk supreme court.

247 In the Supreme Court of the United States.

THE NATIONAL LIVE STOCK BANK OF Chicago, Illinois, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, Illinois, Defendant in Error.
} Assignment of Errors.

The plaintiff in error in this action in connection with its petition for writ of error and as a part thereof makes the following assignment of errors which it avers occurred upon the trial and hearing of this cause, to-wit:

First. The court erred in affirming the judgment of the court below.

Second. The court erred in refusing to reverse the judgment of the court below.

Third. The court erred in holding and deciding that "Section 9 of chapter 120 volume 2 of Webb's Annotated Statutes of Kansas which provides that: 'where any mortgage of personal property shall have been fully paid or satisfied it shall be the duty of the mortgagor, his assignee or personal representative to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be and under the same penalty for a neglect or refusal as provided in the case of the satisfaction of mortgages of real estate,' does not authorize or require one who purchases a negotiable promissory note which is duly transferred by an assignment on the back thereof before maturity to also take a formal assignment of a chattel mortgage given to secure it and have it filed in the office of the register of deeds. The transfer of such note carries with it the assignment of the mortgage there being no law authorizing an assignment of a chattel mortgage given to secure negotiable paper to be placed of record and such assignee, although he has no record title, will be protected against subsequent purchasers and incumbrancers in good faith and may recover against them in a replevin action involving the property included in his mortgage."

Fourth. The court erred in holding and deciding that "A separate instrument executed by a mortgagee acknowledging satisfaction of

a chattel mortgage and payment of the debt secured thereby
248 but which is not acknowledged before some officer named in the statute and certified to as provided therein is not entitled to record and the filing or recording thereof imports no notice."

Fifth. The court erred in holding and deciding that "Duties imposed by implication are only those which are necesarily connected with the subject to which the statute relates and if they are penal they are to be construed strictly, which means that they are not to be so extended by implication beyond the legitimate import of the words used in them as to embrace acts not clearly described by said words."

Sixth. The court erred in holding and deciding that "The mere fact that a mortgagee in Kansas in the absence of a contract to the contrary owns the legal title to the property mortgaged does not require an assignment of such mortgage to be placed of record there being no statute imposing such duty."

Seventh. The court erred in holding and deciding that the defendant in error was not required to take a formal assignment of the chattel mortgage under which it claimed the property in controversy and have the same filed in the office of the register of deeds.

Eighth. The court erred in holding and deciding that there was no authority in the law for the filing of an assignment of the chattel mortgage under which the defendant in error claimed the property in controversy, in the office of the register of deeds.

Ninth. The court erred in holding and deciding that the defendant in error should recover against the plaintiff in error the property in controversy although it, the defendant in error, had no record title thereto.

Tenth. The court erred in holding and deciding that the release of the chattel mortgage, under which the defendant in error claimed the property in controversy, introduced in evidence, should have been acknowledged before some officer named in the statute.

Eleventh. The court erred in holding and deciding that the release of the chattel mortgage under which the defendant in error claimed introduced in evidence was not entitled to record and that the filing or recording thereof imported no notice.

Wherefore, the plaintiff in error prays that the said order and judgment herein complained of be reversed.

FREDERICK S. WINSTON,
JOHN BARTON PAYNE,
SILAS H. STRAWN,
W. E. STANLEY,
R. R. VERMILION, AND
EARLE W. EVANS,
Attorneys for Plaintiff in Error.

[Endorsed:] No. 1541. The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of

Geneseo, Illlinois, defendant in error. Assignments of error. Filed May 6 1905 Benj. F. Hegler, clerk supreme court. By —— ——, deputy.

249 Be it remembered: That on the 6th day of May, A. D., 1905, there was filed in said cause a writ of error and a copy of said writ of error deposited in said court in words and figures following, to wit:

250 THE UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

The President of the United States of America to the honorable judges and clerk of the supreme court of the Territory of Oklahoma, Greeting:

Because in the record of proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of Oklahoma before you, being the highest court of law and equity of the said Territory in which a decision could be had, in the said suit between The National Live Stock Bank of Chicago, Illinois, a corporation, and The First National Bank of Geneseo, Illinois, a corporation, wherein a judgment was rendered in said cause in favor of the defendant in error and against the plaintiff in error affirming a certain judgment of the district court within and for Woodward county, Oklahoma Territory, and rendering judgment therein in favor of the said defendant in error and against the said plaintiff in error and adjudging that said plaintiff in error take nothing by its said action all at the cost of the said plaintiff in error, and wherein the value of the property and the amount in controversy between said parties in said cause exclusive of interest and costs, as shown by the affidavit of Earle W. Evans, Esquire, one of the attorneys of the plaintiff in error, exceeded and exceeds the sum of five thousand dollars ($5,000.00), and is of about the sum of fourteen thousand dollars ($14,000.00). A manifest error has happened to the great damage of said National Live Stock Bank of Chicago, Illinois, as by its complaint and assignment of errors appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same at Washington at the said Supreme Court within thirty days from the date hereof. That the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of
251 said Supreme Court, the 6th day of May, in the year of our Lord one thousand nine hundred and five, in the one hundred thirtieth year of the Independence of the United States of America.

BENJ. F. HEGLER,
[SEAL.] Clerk of the Supreme Court of
the Territory of Oklahoma.

The above writ of error is hereby allowed.

JNO. H. BURFORD,
Chief Justice of the Supreme Court
of the Territory of Oklahoma.

Said writ of error is endorsed: No. 1541—The National Live Stock Bank of Chicago Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error,—Writ of error—Filed May 6, 1905, Benj. F. Hegler, clerk supreme court.

252 Be it further remembered: That on the said 12th day of May A. D., 1905, there was also filed in said cause a citation in pursuance of said writ of error together with an acknowledgment of service thereof in words and figures following, to-wit:

253 THE UNITED STATES OF AMERICA, } *ss.*:
Territory of Oklahoma, }

To the First National Bank of Geneseo, Illinois, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America to be holden at the city of Washington on the 5th day of June, A. D., 1905, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Oklahoma wherein The National Live Stock Bank of Chicago, Illinois, is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error prayed should not be corrected and why speedy justice should not be done to the said party in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of May, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred thirtieth.

[Seal Supreme Court, Territory of Oklahoma.]

JNO. H. BURFORD,
Chief Justice of the Supreme Court
of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
Clerk of Supreme Court, Territory of Oklahoma.

We hereby accept personal service of this citation on behalf of the defendant in error, The First National Bank of Geneseo, Illinois, above named this 6" day of May, A. D., 1905.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Defendant in Error in said Cause.

[Endorsed:] No. 1541. The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error. Citation and proof — service thereof. Filed May 12 1905 Benj. F. Hegler clerk supreme court. By —— —— deputy.

254 Be it further remembered: that on the 6th day of May, A. D., 1905, an order was made in said court in said cause in words and figures as follows, to-wit:

In the Supreme Court of the Territory of Oklahoma.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant in Error. } Order.

On this 6th day of May, A. D., 1905, came the plaintiffs in error by its attorneys and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by it praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had that may be proper in the premises.

In consideration whereof the court does allow the writ of error, and if plaintiff in error shall within twenty days give bond according to law in the sum of twenty thousand dollars ($20,000.00) the same shall operate as a supersedeas bond.

JNO. H. BURFORD,
Chief Justice of the Supreme Court
of the Territory of Oklahoma.

Attest: BENJ. F. HEGLER,
[SEAL.] Clerk Supreme Court.

Said order is endorsed: No. 1541 The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error. Order allowing writ of error. Filed May 6, 1905, Benj. F. Hegler, clerk supreme court.

255 Be it further remembered: that on the 2nd day of June, 1905, there was filed in said cause a bond for costs on the writ of error, which said bond is in words and figures following, to wit:

256 In the Supreme Court of the United States.

THE NATIONAL LIVE STOCK BANK OF Chicago, Illinois, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF Geneseo, Illinois, Defendant in Error.
} Cost Bond on Writ of Error.

Know all men by these presents, that we, The National Live Stock Bank of Chicago, Illinois, plaintiff in error, as principal, and American Surety Company, as sureties, are held and firmly bound unto the defendant in error in the full and just sum of five hundred dollars ($500.00), to be paid to the said defendant in error, The First National Bank of Geneseo, Illinois, its certain attorneys, successors or assigns to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of May, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a session of the supreme court of the Territory of Oklahoma in a suit pending in said court between The National Live Stock Bank of Chicago, Illinois, plaintiff, and the First National Bank of Geneseo, Illinois, defendant, a judgment and decision was rendered against the said The National Live Stock Bank of Chicago, Illinois, plaintiff therein and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office in the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant in error citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 5th day of June next.

Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute said writ of error to effect and answer all costs if it fail to *am*ke the said plea good then the above obligation to be void, else to remain in full force and virtue.

In witness whereof we hereunto set our hands this 24th day of May, A. D. 1905.

257 THE NATIONAL LIVE STOCK BANK OF CHICAGO,
By S. R. FLYNN, President.

[Seal The National Live Stock Bank of Chicago.]

Attest: G. A. RYTHER, Cashier.

AMERICAN SURETY COMPANY OF NEW YORK,
By J. W. McNEAL, Res. Vice President.

[Seal American Surety Company, New York.]

Attest: JOHN J. HILDRETH, Res. Ass't Sec't'y.

The foregoing bond and surety approved by me this 31 day of May, A. D. 1905.

JNO. H. BURFORD,
Chief Justice of the Supreme Court
of the Territory of Oklahoma.

258 [Endorsed:] No. 1541 The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error Cost bond on writ o error Filed Jun- 2 1905 Benj. F. Hegler clerk supreme court, by —— ——, deputy.

259 UNITED STATES OF AMERICA, } *ss:*
Territory of Oklahoma, }

In the Supreme Court.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 258 pages, numbered from 1 to 258, inclusive, are a true and complete transcript of the record and all proceedings in said supreme court in the case of The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error, No. 1541, as the same remain upon the files and records of said supreme court.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 2d day of June, 1905.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the
Territory of Oklahoma.

Endorsed on cover: File No. 19,786. Oklahoma Territory supreme court. Term No. 284. National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* First National Bank of Geneseo, Illinois. Filed June 5th, 1905. File No. 19,786.

FILE COPY.

FILED
APR 2 1906
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. [redacted].33

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS,
Plaintiff in Error,
vs.
FIRST NATIONAL BANK OF GENESEO, ILLINOIS,
Defendant in Error.

Error to the Supreme Court of the Territory of Oklahoma.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

FREDERICK S. WINSTON,
JOHN BARTON PAYNE,
SILAS H. STRAWN,
RALPH M. SHAW,
Attorneys for Plaintiff in Error.

BLACKBURN ESTERLINE,
EARLE W. EVANS,
Of Counsel.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 284.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, *Plaintiff in Error,* *vs.* **FIRST NATIONAL BANK OF GENESEO, ILLINOIS,** *Defendant in Error.*	Error to the Supreme Court of the Territory of Oklahoma.

STATEMENT OF THE CASE.

This is an action in replevin commenced in the District Court of Woodward County, Oklahoma, and brought into this court on a writ of error to the Supreme Court of that Territory. There is over $14,000 involved (Rec., 151) and both parties are national banking corporations with their places of business located in the State of Illinois. A jury was waived and the cause submitted to the court, which found for the National Live Stock Bank of Chicago, plaintiff in error, and rendered judgment accordingly. On a writ of error from the Supreme Court of Oklahoma

the judgment was reversed with a full statement and a finding of facts, as follows (Rec., 141, 142):

"W. B. Grimes, who lived in Clark County, Kansas, on June 27, 1900, executed to Siegel-Sanders Live Stock Commission Company his negotiable promissory note for $11,111.23, due November 1, 1900, with interest from maturity at the rate of eight per cent. per annum. To secure the payment of this note, at the same time, he duly executed a chattel mortgage to the payee of the note, on five hundred and twenty-six cattle, and this mortgage was filed in the office of the register of deeds of Clark County on July 12, 1900. This note was then assigned by the payee to the Geneseo Bank.

On October 24, 1900, and after the note just described had been assigned to the Geneseo Bank, Grimes executed to Siegel-Sanders Live Stock Commission Company two other notes, one for $7,033.24 and one for $7,000, due six months after date, and gave a chattel mortgage to the commission company on 633 head of cattle (which included the cattle described in the first mortgage) to secure these two notes, which were assigned to the Chicago Cattle Loan Company.

On November 24, 1900, although the Siegel-Sanders Live Stock Commission Company had sold the note for $11,111.23 to the Geneseo bank, it, through its president, Frank Siegel, without any authority, filed in the office of the register of deeds a pretended release, in which payment of the note was acknowledged.

On February 25, 1901, the Chicago Cattle Loan Company caused its agent, Mr. True, to examine the records of Clark County as to the chattel mortgages against Grimes, and upon this examination he found the record clear, except as to the mortgage held by his company, and so reported to it. On April 17, 1901, Grimes executed two other notes to Siegel-Sanders L. S. Com. Co., for $7,694.77 each, due October 27, 1901, and to secure the payment of these two notes, he, at the same time, executed a chattel mortgage on 606 of the cattle in question. These two notes were then sold to the National Live Stock Bank of Chicago

for $15,389.54, and it believed at the time it bought these notes that the mortgage securing them was a first lien on the cattle and it secured this information through Mr. True, who personally examined the record. It is insisted that these notes were given as a renewal of the second set of notes taken by the Siegel-Sanders Co., but perhaps that is not material under our view of the law.

Grimes moved these cattle to Woodward County, Oklahoma, between April 25th and May 1st, 1901, without the knowledge or consent of either of the parties to this suit. They were seized by the Geneseo Bank between the 19th and 20th of May, 1901, and the Chicago bank, within one year from the filing of the first mortgage in the office of the register of deeds of Clark County, Kansas, commenced this suit in replevin in the District Court to recover possession of the cattle, claiming under the mortgage which was executed to the Siegel-Sanders L. S. Com. Co. on April 17, 1901; and the Geneseo bank claiming under the mortgage dated June 27, 1900, which was released by the Siegel-Sanders L. S. Com. Co. after its assignment to the Geneseo bank. There is practically no dispute as to the facts; and the trial court expressly held that both the parties to this action acted in good faith. It was agreed that the court should take into consideration all of the laws of Kansas, the same as though they had been formally introduced in evidence and copied into the record; and as each party is still insisting upon this agreement, this court will adhere to it."

For convenience, the plaintiff in error, National Live Stock Bank of Chicago, will hereafter be termed the Chicago Bank; the defendant in error, First National Bank of Geneseo, will hereinafter be termed the Geneseo Bank; and the Siegel-Sanders Live Stock Commission Company will hereinafter be termed the Commission Company.

The cause was remanded by the Supreme Court of Oklahoma at the cost of the appellee. (Rec., 140.)

(76 Pac. Rep., 130.) It was retried in the District Court of Woodward County, Oklahoma, on a transcript of the record of the former trial, upon a stipulation of the parties and the further stipulation that they might introduce such decisions of the Supreme Court of Kansas or of the Territory of Oklahoma as they might desire.

Upon the second trial, as upon the first, the Chicago Bank contended, under the facts as found and the stipulations of the parties, that the Geneseo Bank was negligent in not taking and recording an assignment to it of the chattel mortgage when it purchased the note, and that when the release of that mortgage was recorded by the Commission Company, in whom the title to the cattle stood of record, such release cleared the cattle of the lien, and the lien of the second mortgage in the hands of the Chicago Bank was paramount; that when one of two innocent parties must sustain loss the burden should be borne by him through whose negligence the loss was brought about. On the other hand, the Geneseo Bank contended that under the laws of Kansas it was not obliged to take and record an assignment of the mortgage, because the assignment of the note carried the mortgage with it; that the release was not executed in accordance with the laws of Kansas in that it was not acknowledged and that it could not be bound thereby in any event, because the Commission Company had no authority to execute it.

Upon April 18, 1904, the *nisi prius* court of the territory, following the directions in the opinion of the Supreme Court of the territory, found for the Geneseo Bank and, the Chicago Bank having disposed of the

cattle under the writ of replevin, rendered judgment against the Chicago Bank in favor of the Genesco Bank for $14,417.33, principal, interest and costs. (Rec., 132.) On a second writ of error from the Supreme Court of the Territory of Oklahoma the judgment was affirmed February 11, 1905 (79 Pac. Rep., 1134), the court stating it could add nothing to its former opinion, "in which it made a full statement and finding of facts and enunciated the law as applied thereto." (76 Pac. Rep., 130.) The case was then brought to this court on a writ of error under the Act of Congress providing for a review by this court of the judgments of territorial courts of last resort, with an assignment of errors. (Rec., 152.)

The statutes of the State of Kansas existing during the various transactions set forth may be found in General Statutes of Kansas for 1901, by Dassler, and are printed in this brief as an Appendix.

POINTS AND AUTHORITIES.

I.

THE FAILURE OF THE GENESEO BANK TO TAKE AND RECORD AN ASSIGNMENT OF THE CHATTEL MORTGAGE LEFT IT WITHIN THE POWER OF THE COMMISSION COMPANY TO RELEASE THE SAME OF RECORD. THE GENESEO BANK SHOULD ABIDE BY THE CONSEQUENCES OF ITS NEGLIGENCE AND SUSTAIN THE LOSS, AS IT IS THE LAW THAT WHEN ONE OF TWO INNOCENT PARTIES MUST SUFFER, THE LOSS SHOULD BE BORNE BY HIM THROUGH WHOSE NEGLIGENCE IT WAS BROUGHT ABOUT.

Statutes of Kansas by Dassler, Section 4234, par. 19; Section 4241, par. 26 (appendix).

Lewis v. *Kirk*, 28 Kan., 356.

Thomas v. *Reynolds*, 29 Kan., 217.

Parkhurst v. *First Nat. Bank of Clyde*, 35 Pac. Rep., 1116.

Williams v. *Jackson*, 107 U. S., 478.

Swasey v. *Emerson et al.*, 46 N. E., 426.

Ogle v. *Turpin*, 102 Ill., 148.

Mann v. *Jummel*, 183 Ill., 533.

Lennartz, v. *Quilty*, 191 Ill., 174.

Bowling v. *Cook et al.*, 39 Iowa, 200.

Rand, Ex'r. v. *Barrett et al.*, 24 N. W., 530.

Jenks v. *Shaw*, 68 N. W., 900.

Purdy v. *Huntington*, 42 N. Y., 339.

Van Keuren v. *Corkins*, 66 N. Y., 79.

Clark v. *Mackin*, 95 N. Y., 345.

Porter v. *Ourada*, 71 N. W., 52.

Conn. Mutual Life Ins. Co. v. *Talbot*, 113 Ind., 373 (14 N. W., 588).

Baugher v. *Woolen*, 45 N. E., 94.
Ayers v. *Hays*, 60 Ind., 455.
Morris v. *Beecher et al.*, 45 N. W., 696.
Pickford v. *Peebles et al.*, 63 N. W., 779.
Banking Co. v. *Woodruff*, 2 N. J. Eq., 117.
Ferguson v. *Glassford et al.*, 35 N. W., 820.
Jones on Mortgages, Sections 481, 820, 791.
Cobbey on Chattel Mortgages, Section 648.
Townsend v. *Little*, 109 U. S., 504.

II.

THE EXECUTION, FILING AND RECORDING OF THE RELEASE OF THE CHATTEL MORTGAGE BY THE COMMISSION COMPANY, IN WHOM THE RECORD TITLE TO THE CATTLE STOOD, WAS A NOTICE TO ALL THE WORLD THAT THE DEBT SECURED BY THE MORTGAGE HAD BEEN PAID AND THAT THE CATTLE WERE CLEARED OF THE LIEN.

Statutes of Kansas by Dassler, Section 4251, par. 36; Section 4221, par. 6; Section 4224, par. 9; Section 4249, par. 34; Section 4222, par. 7 (appendix).

Testimony of Sargeant (Rec., 107).

Opinion of Burwell, J., Supreme Court, Territory of Oklahoma (Rec., 148).

Carpenter v. *Longan*, 16 Wall., 271, citing *Pierce* v. *Faunce*, 47 Me., 513.

Drum-Flato Com'n. Co. v. *Barnard et al.*, 66 Kan., 568.

ARGUMENT.

I.

THE FAILURE OF THE GENESEO BANK TO TAKE AND RECORD AN ASSIGNMENT OF THE CHATTEL MORTGAGE LEFT IT WITHIN THE POWER OF THE COMMISSION COMPANY TO RELEASE THE SAME OF RECORD. THE GENESEO BANK SHOULD ABIDE BY THE CONSEQUENCES OF ITS NEGLIGENCE AND SUSTAIN THE LOSS, AS IT IS THE LAW THAT WHEN ONE OF TWO INNOCENT PERSONS MUST SUFFER, THE LOSS SHOULD BE BORNE BY HIM THROUGH WHOSE NEGLIGENCE THE SUFFERING WAS BROUGHT ABOUT.

Under this point the following errors assigned are here particularly specified, viz.:

First. The court erred in affirming the judgment of the court below.

Second. The court erred in refusing to reverse the judgment of the court below.

Third. The court erred in holding and deciding that "Section 9 of Chapter 120, Volume 2, of Webb's Annotated Statutes of Kansas, which provides that: 'Where any mortgage of personal property shall have been fully paid or satisfied it shall be the duty of the mortgagor, his assignee or personal representative to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be and under the same penalty for a neglect or refusal as provided in the case of the satisfaction of mortgages of real estate,' does not authorize or require one who purchases a negotiable promissory note which is duly transfered by an assignment on the back thereof be-

fore maturity to also take a formal assignment of a chattel mortgage given to secure it and have it filed in the office of the register of deeds. The transfer of such note carries with it the assignment of the mortgage there being no law authorizing an assignment of a chattel mortgage given to secure negotiable paper to be placed of record and such assignee, although he has no record title, will be protected against subsequent purchasers and incumbrancers in good faith and may recover against them in a replevin action involving the property included in his mortgage."

Fifth. The court erred in holding and deciding that "Duties imposed by implication are only those which are necessarily connected with the subject to which the statute relates and if they are penal they are to be construed strictly, which means that they are not to be so extended by implication beyond the legitimate import of the words used in them as to embrace acts not clearly described by said words.'

Sixth. The court erred in holding and deciding that "The mere fact that a mortgagee in Kansas in the absence of a contract to the contrary owns the legal title to the property mortgaged does not require an assignment of such mortgage to be placed of record there being no statute imposing such duty."

Seventh. The court erred in holding and deciding that the defendant in error was not required to make a formal assignment of the chattel mortgage under which it claimed the property in controversy and have the same filed in the office of the register of deeds.

Eighth. The court erred in holding and deciding that there was no authority in the law for the filing of

an assignment of the chattel mortgage under which the defendant in error claimed the property in controversy, in the office of the register of deeds.

Ninth. The court erred in holding and deciding that the defendant in error should recover against the plaintiff in error the property in controversy although it, the defendant in error, had no record title thereto.

The question now presented does not seem ever to have been directly presented to the Supreme Court of Kansas, though this court and the highest court of almost every other state has passed upon the question in one form or another.

While its is a proposition undoubtedly sound that as between the parties "the note and mortgage are inseparable," and that the mortgage "cannot survive for a moment the debt which the note represents," it is also a proposition equally sound that when the rights of *bona fide* holders intervene, other principles of law obtain.

As to the rights of the Commission Company and Grimes, the mortgagor, the principle is applicable that the note and mortgage are inseparable, as they are the immediate parties. That the Geneseo Bank had full knowledge that the Commission Company had no power or authority to release the chattel mortgage renders its position utterly hopeless when a *bona fide* purchaser appears.

The Chicago Bank assumed, and in contemplation of law it rightly assumed, that the Commission Company did have the power and authority to release that chattel mortgage. The Chicago Bank was not only a *bona fide* purchaser for value without notice that

the Commission Company had assigned the notes and had no power or authority to release the chattel mortgage, but it was such a purchaser charged *with notice* that the Commission Company had not assigned the notes or mortgage and did have such power and authority, as the public record so proclaimed,—the highest assurance known to the law. If the Commission Company had no power or authority to release that mortgage, that lack of power or authority was a secret so carefully guarded between it and the Geneseo Bank that it was known to no other human being; whereas, the open and notorious records of Clark County, Kansas, continuously proclaimed to the Chicago Bank and to all the world, that the Commission Company was the only party clothed with power to release that mortgage, and when it did release it on the record, the authority to do so was presumed.

Assuming that the release was fraudulent the Geneseo Bank cannot complain, for the fraud was a direct offspring of its failure to take an assignment of the mortgage as well as the notes, and to record the same.

The Supreme Court of the Territory held that the Chicago Bank was not in a position to complain, because the release was irregular. It admitted that the release was good between the parties of record as it showed the debt had been paid. That being the case, there was nothing else to be said, as the record was clear.

Examine this case in any light that you choose, the inevitable result is that the Geneseo Bank was negligent in not taking and recording an assignment of the mortgage. That bank trusted the Commission

Company, and, as was said by Mr. Justice Swayne, in *Carpenter* v. *Longan*, 16 Wall., 271:

"If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who 'puts trust and confidence in the deceiver should be a loser rather than a stranger.'"

The statute of Kansas declares expressly that mortgages on real estate shall be recorded; so also with mortgages on personal property. The statute declares that discharges of mortgages on real estate shall be recorded (Appendix, Sec. 4224); so also with mortgages on personal property (Appendix, Sec. 4251). The statute imposes a penalty upon any mortgagee or assignee of a mortgage on real estate who shall refuse to enter satisfaction of record of such mortgage, after the same shall have been paid, of $100, an attorney's fee and any consequent damages (Appendix, Sec. 4224); so also with mortgages on personal property (Appendix, Sec. 4251). The statute declares that discharges of mortgages on real estate may be entered on the margin of the record of such mortgage (Appendix, Sec. 4221); so also with mortgages on personal property (Appendix, Sec. 4251). The statute expressly provides (Sec. 4251) that "When any mortgage on personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, his assigns or personal representative to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be, and under the same penalty for a neglect or refusal, as provided in case of a satisfaction of mortgage of real estate."

Though it may not be the letter of the law of Kansas that the assignment of a chattel mortgage shall be recorded, such is the manifest spirit of that law, be-

cause it is provided that an *assignee* of a chattel mortgage must release the same as a *mortgagee* must do. How could the mortgagee, "his assignee or personal representative" enter of record the discharge of a chattel mortgage unless the law implied that the assignment of the mortgage be recorded? As Mr. Justice Brewer once said (*Thomas* v. *Reynolds*, 29 Kan., 217) his satisfaction in such a case would apparently be only "an impertinent interference."

Judge Jones in his late work on "Mortgages," on very high authority, says (Sec. 479):

"The registration laws and doctrines of priority by record generally extend to assignments of mortgages as well, either by express provision of statute or by judicial construction. Where the statutes themselves do not in terms directly apply to assignments of mortgages, the courts have generally drawn an inference of intended application."

In *Lewis* v. *Kirk*, 28 Kan., 356, Romaine executed a note to Shaver, and secured the same by a real estate mortgage. Shaver transferred the note and mortgage by endorsement of the note and delivery of the mortgage to the Farmers and Merchants Bank of Wichita. No written assignment of the mortgage was ever made and recorded. Afterwards, but before the maturity of the note, Kirk purchased the property from Romaine, paying to Romaine $300 to discharge a prior mortgage; $80.65 to Shaver for releasing the mortgage executed to him, and $96.61 to Romaine. Kirk at the time, had no knowledge that the note and mortgage which had been executed by Romaine to Shaver had been transferred to the Farmers and Merchants Bank and had no knowledge of the character of the note and mortgage, except as the same was shown by the rec-

ord of the mortgage in the recorder's office. Afterwards the bank transferred the note and mortgage to its president, Lewis, who commenced the action to recover upon the same, making Romaine and Kirk parties defendant. In passing upon the question, the court said:

"The question now arises, who shall suffer from the fraud of Shaver,—the *bona fide* holder of the note and mortgage, or the *bona fide* purchasers of the mortgaged property? The plaintiff claims that it must be the purchaser of the property; and he founds that claim exclusively upon the negotiable character of the note and mortgage. The defendant, on the other hand, claims that it is the plaintiff who must lose; and she founds her claim upon the laws regulating the sale and conveyance of real estate, the registry laws, etc., and upon the claim that, although the note is negotiable, the mortgage is not. Now, it must be admitted that a mortgage, in the abstract, is not, and never was, a negotiable instrument; and that even where it is made for the purpose of securing some debt, or instrument, or act or transaction, not negotiable, it is not, and never was, a negotiable instrument. In this state, the only negotiable instruments are bills of exchange, promissory notes and bonds, payable to order or bearer; and if payable to order and transferred, then endorsed by the payee thereof. But it is claimed by the plaintiff that, when a mortgage is executed to secure the payment of a negotiable instrument, it so far partakes of the negotiable character of such instrument as to become itself negotiable; and in support of this proposition the plaintiff cites several cases. * * * To this extent, we think the claim of the plaintiff is correct. A mortgage in this state is only a security, only an incident to the debt which it is made to secure, and, like all other securities, it follows the debt and partakes of its nature and character.

"The defendant, however, disputes this doctrine, even to the extent above suggested, and cites many au-

thorities which seem to sustain his view of the case; among which one of the ablest and most thoroughly considered is the case of *Baily* v. *Smith*, 14 Ohio St., 396, 405 *et seq.* * * *

"Under the authorities, we would also think that whenever the payee and mortgagee of a negotiable promissory note, and its attendant mortgage, transfers such note and mortgage by endorsement of the note, he cannot then discharge the mortgage of record so as to affect existing rights. This would seem to be the doctrine enunciated in the following cases: *Roberts* v. *Halstead*, 9 Pa. St., 32; *Vandercook* v. *Baker*, 48 Iowa, 199. *But none of the cases yet cited reach the present case.* The authorities so far cited go only to the extent of saying that the transfer, before due, of a negotiable instrument, secured by a mortgage, cuts off all equities existing in favor of the maker of the note and mortgage, or in favor of any person who has put the same in circulation as maker or endorser, or who has notice, constructive or actual, of the existence of the mortgage, *and no sufficient and legal notice of its discharge or satisfaction; and they do not go to the extent of saying that no person can become an innocent and bona fide purchaser of the mortgaged property so as to obtain it freed from the mortgaged debt, when the records of the county apparently show that the mortgage debt is no lien upon the property, or when they fail to show that it is such lien.*

"The plaintiff claims that the case of *Burhans* v. *Hutcheson*, 25 Kan., 625, is conclusive in his favor in the present case. We do not think so, however. In that case the discharge of the mortgage of record was not made by the mortgagee, but was made by the mortgagor himself; that is, the mortgagor seemingly attempted to release himself from his own mortgage, a mortgage which he himself had executed, and to discharge himself from his own debt. The discharge in that case was void—the same as no discharge at all. *In the present case, the contest is between a bona fide holder of the note and mortgage and a bona fide purchaser of the mortgaged property, who had no knowl-*

edge, actual or constructive, that any person except the mortgagee had any interest in the note and mortgage; and the release of the mortgage was made by the mortgagee himself. The release in this case was by the right person and was valid. The two cases are so absolutely dissimilar that the one reported in 25 Kan. can be no authority for this. * * *

"Or, if the mortgage has been recorded and then has been regularly released on the margin of the record thereof by the mortgagee, then we think that any person, if he does it in good faith, may purchase the property, in like manner, freed from all liens and equities existing in favor of the holder of the mortgage; or, in other words, and to state the proposition more succinctly, a purchaser in good faith of real estate may always rely upon the public records, subject only to the equities of persons in open, visible and exclusive possession of the property. A purchaser in good faith of real estate is never bound to take notice of secret equities, liens, interests, trusts or incumbrances which cannot be discovered from an inspection of the public records, or cannot be ascertained by inquiries from the parties in possession. He may always rely upon the public records and such inquiries as they suggest, and such inquiries as are proper of the parties in possession; and if, from all these, the title appears to be clear, he will then obtain a good title, although there may be some outstanding equity or lien in favor of some other person. * * *

"But when the mortgage is recorded, its negotiable character is then extended even to *bona fide* purchasers of the property, and it retains such character contemporaneously with the existence of the note to which it is an incident until the note is satisfied or until the mortgage is released of record by the mortgagee, or his attorney, assignee, or personal representative; and that when the mortgage is so released, it then loses its negotiable character to the extent that any third person who may then purchase the property in good faith, will obtain the full, complete and absolute title thereto, freed from all equities, liens, interests, trusts,

or incumbrances existing in favor of any holder of the note and mortgage, whether the note is satisfied or not."

In *Thomas* v. *Reynolds,* 29 Kan., 216, Mr. Justice Brewer construed the section of the Kansas statute, with reference to the release and satisfaction of chattel mortgages, as follows:

"Finally, it is insisted that the plaintiffs in error were not the mortgagees, but simply the assignees, that there is no allegation or proof that there was ever an assignment placed on record; that, therefore, a satisfaction by the defendants would *prima facie* be irrelevant, and no release of the mortgage; that apparently it would be nothing but the impertinent interference of a stranger, and that unless it is shown that some assignment is recorded,—something which vests the record title in the defendants, they canont be held responsible for a failure to enter satisfaction. And in support of this, *Low* v. *Fox,* 56 Iowa, 221, 9 N. W. Rep., 131, is cited. We think this objection is good. The statute is a penal one. The object of the statute, as we have held in response to the argument of the defendant in error, is to clear the record title of the property. But, to clear that record, the parties satisfying must have record title. If not, their release and satisfaction clears nothing. It is apparently an impertinent interference. We think before a penal statute can be enforced for the default of a party, it must appear, not merely that he has failed to act, but also that the act which he has failed to do would accomplish the purpose intended by the statute. A satisfaction of a record by a stranger to a record clears no title, gives no notice. It stands as before the attempted satisfaction—a matter resting purely upon parol testimony."

If the laws of Kansas do not imply that an assignment of a chattel mortgage shall be recorded, then the section of the statute levying a penalty of $100, an attorney's fee and any consequent damages on an *as-*

signee of a chattel mortgage for failure to release the same was, in the light of the above opinion of Mr. Justice Brewer, a mere waste of words.

In *Parkhurst* v. *First National Bank of Clyde*, 35 Pac. Rep., 1116 (Kan. 1894), Chief Justice Horton, following *Thomas* v. *Reynolds, supra*, said:

"The court instructed the jury that before the plaintiff was entitled to recover, the mortgagee must be the defendant, or the defendant must be the assignee of the chattel mortgage by an assignment filed or recorded.

This instruction follows the rule adopted in *Thomas* v. *Reynolds*, 29 Kan., 304. It was held in that case that where a mortgage has been assigned no action under the statute will lie to recover the penalty without proof of an assignment of record. The purpose of the statute being to clear the record, the defaulting party must have record title, or his satisfaction will apparently be only an impertinent interference by a stranger."

It thus appears from at least two decisions of the highest court of the State of Kansas, that the laws of that state imply that the assignment of a chattel mortgage shall be recorded and that there are instances in which the assignee who failed to record the assignment must lose because of such failure.

In *Williams* v. *Jackson*, 107 U. S., 478, by a trust deed duly recorded, land was conveyed to the trustee in fee, and they were authorized to release it to the grantor upon payment of the negotiable promissory note thereby secured. Before that note was paid or payable and after it had been negotiated to an indorsee in good faith, for full value, a deed of release, reciting that it had been paid, was made to the grantor, by the trustees and by the payee of the note and recorded;

and the grantor executed and recorded a like trust deed, to secure the payment of a new note for money loaned to him by another person, who had no actual notice that the first note had been negotiated and was unpaid, and who, before he would make the loan, required and was furnished with a conveyancer's abstract of title, showing that the three deeds were recorded and the land free from encumbrances. This court held that the legal title was in the trustee under the second trust deed and that the note secured thereby was entitled to priority of payment out of the land. Mr. Justice Gray, in delivering the opinion, said:

"The first deed of trust having been made to the trustees therein named, for the benefit of Augustus Davis, and to secure the payment of the notes from the grantors to him; and the plaintiffs, upon the transfer and endorsement to them of those notes, having taken no precaution to obtain and put on record an assignment of his rights in such form as would be notice to all the world; *the recorded deed of release executed by him, as well as by the trustees, reciting that the notes had been paid, and conveying the legal title, bound the plaintiffs, as well as himself, in favor of anyone acting upon the faith of the record, and ignorant of the real state of facts.*

If the plaintiffs wished to affect subsequent purchasers with notice of their rights, they should have obtained a new conveyance or agreement, duly acknowledged and recorded, in the form either of a deed from the original grantors or of a declaration of trust from the trustees or of an assignment from Augustus Davis of his equitable interest in the land as security for the payment of the notes. *The record not showing that any person other than Augustus Davis had any interest in the notes or in the land, as security for their payment, an innocent subsequent purchaser or incumbrancer had a right to assume that the trustees,*

in executing the release, had acted in accordance with their duty.

Williams is admitted to have had no actual knowledge that the notes secured by the first trust deed were held by the plaintiffs or that they were unpaid. * * *

Williams took every reasonable precaution that could have been expected of a prudent man,before advancing his money to Charles T. Davis for Sweet and wife. He declined to lend his money until after he had been furnished with a conveyancer's abstract of title showing that the deed of release from the trustees under the first deed of trust and from the original holder of the notes secured thereby, as well as the second deed of trust to secure the repayment of the money lent by Williams, had been recorded, and that the land was not subject to any encumbrance prior to the second deed of trust.

It was suggested in argument that as the first deed of trust showed that the notes secured thereby were negotiable and were not yet payable, and that the land was not intended to be released from this trust until all the notes were paid. Williams was negligent in not making further inquiry into the fact whether they were still unpaid, but of whom should he have made inquiry? The trustees under the first deed and the original holder of the notes secured thereby having expressly asserted, under their own hands and seals, that the notes had been paid, and Sweet and his wife having apparently concurred in the assertion by accepting the deed of release and putting it on record, he certainly was not bound to inquire of any of them as to the truth of that fact; and there was no other person to whom he could apply for information, for he did not know that the notes had ever been negotiated and he had no reason to suppose that they had not been cancelled and destroyed.

To charge Williams with constructive notice of the fact that the notes had not been paid, in the absence of any proof of knowledge, fraud, or gross or wilful negligence on his part, would be inconsistent with the

purpose of the registry laws, with the well settled principles of equity and with the convenient transaction of business."

In *Swasey* v. *Emerson et al.*, 46 N. E., 426 (Mass.), R executed three mortgages to an investment company, which assigned and delivered them to a safe deposit company, which delivered them to a trust company. None of the assignments was recorded. Subsequently the investment company, the original mortgagee, executed discharges of the mortgage to one Roett, who in the meantime had become the owner of the land. Thereupon Roett executed a new mortgage to Emerson "who took it in good faith and for value relying upon the discharge and the title as it appeared in the registry." Emerson did not demand production of the prior mortgages or the notes when he took the new mortgage from Roett. On bill filed to establish priority of the mortgages, and to declare void the discharges thereof, the same was dismissed. On affirming the order of dismissal, Mr. Justice Holmes, speaking for the Supreme Judicial Court of Massachusetts, said (p. 426):

"The main argument for the plaintiff, in a few words, is, of course, that Emerson had notice of the mortgages, and of the possibility that the notes might have been assigned by the mortgagee, as they had been in fact, in which case the right of the mortgagee to make the discharges was at an end, and, therefore, that he was bound to call for the notes before relying on the discharges, just as a mortgage debtor is before he can pay the debt to the mortgagee with safety, or as in the case of a would-be purchaser of the mortgage debt. *Biggerstaff* v. *Marston*, 161 Mass., 101, 36 N. E., 785.

The argument for Emerson is equally obvious, and, in our opinion must prevail. When the title to land

By the COURT: He can state the fact whether he did or not.

A. I made my report to the Chicago Cattle Loan Company.

By Mr. STRAWN: As indicated in your testimony?

A. Yes sir.

Q. Do you know whether that report was communicated to the National Live Stock bank?

A. That I couldn't say because my duties kept me in the field all the time; I simply did my work that I was sent to do.

Q. State who are the officers of the Chicago Cattle Loan Company if you know?

A. The president of the Chicago Cattle Loan Company is Nathaniel Thayer, president, Levy B. Doud, vice president, R. Z. Herrick, treasurer, and Gates A. Ryther, secretary.

Q. Where is the office of the Chicago Cattle Loan Company?

A. With the National Live Stock bank.

Q. That is the plaintiff in this suit?

A. Yes sir.

Q. State who are the officers of the National Live Stock bank if you know, and were in 1901, at the time of your visit to Ashland?

A. The president of the National Live Stock bank at the time I made my visit to Ashland was Levy B. Doud, president, R. Z. Herrick, vice president, and Gates A. Ryther, cashier.

Q. Were the officers which you named as being the present officers of the Chicago Cattle Loan Company, the officers of that company at the time you made that visit to Ashland, in 1901?

A. The officers are the same today as they were at the time I was there.

138 By Mr. STRAWN: In that connection I desire to read the deposition of Levy B. Doud, taken at Chicago, before G. Russell Leonard notary public, on the 28th day of March, 1902.

By Mr. MARUM: I would state at this time that the depositions herein were not published one day prior to the beginning of this trial, but we do not wish to exclude them, and reserve the right to make the same objections to them as we would have done if we had had more time.

By Mr. STRAWN: The deposition to which I now refer was filed in the office of the clerk of this court on the 21st day of April 1902. My recollection is that the statute requires that they should be simply filed.

By Mr. YOUNG: I desire to object to all this testimony because it has been admitted here in open court that we bought this note and paid for it and now own it, and that it is unpaid, and I cannot see the relevancy of that testimony anywhere.

By Mr. STRAWN: This testimony, if the court please, goes to the extent and for the purpose of showing the diligence that we exercised in the purchase of this property and what pains we took to see that it was the first lien upon the property in question and to show

the nature of our transactions with the Siegel-Sanders Commission Company, and to show that no one thought two mortgages were in existence after this mortgage to the First National Bank of Geneseo was released of record——

By Mr. YOUNG: That don't bind us; the question is whether or not this mortgage has been paid or released; it has been admitted that this note has not been paid and is still alive.

By the COURT: Go ahead with the evidence.

139 LEVI B. DOUD, of lawful age, being by me first duly examined, cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Direct examination by Mr. STRAWN:

Q. State your name and occupation.

A. Levi B. Doud. Live stock commission buyer.

Q. How long have you been in the cattle business in the city of Chicago as commission merchant or otherwise?

A. Thirty years.

Q. State what if any connection you have had with the National Live Stock Bank of Chicago.

A. I was president of the National Live Stock bank from about the 1st of July, 1889 until 1902.

Q. What relation if any do you now sustain to that bank?

A. I am a director.

Q. What relation if any do you sustain to the Chicago Cattle Loan Company?

A. Vice president.

Q. How long have you been connected with the Chicago Cattle Loan Company?

A. Since its organization.

Q. When was that?

A. I don't know as I could tell, I think it was 1898 or 1899.

Q. What is the business of the Chicago Loan Company?

A. Buying and selling paper which is secured by chattel mortgages on live stock.

Q. What experience if any have you had with the purchase and negotiation of paper secured by chattel mortgage upon live stock. State in a general way.

140 A. We do sell large amounts, a good many millions a year of paper secured by cattle mortgages on cattle.

Q. What is the custom or practice with the National Live Stock bank and with the Chicago Cattle Loan Company with reference to the taking and discounting of paper?

A. Commission men at the yards take paper from feeders of cattle and bring it to us, which we discount and credit their account with the proceeds.

Q. Or pay them the money as the case may be?

A. Or pay them the money if they desire.

Q. State whether or not the Chicago Cattle Loan Company ever had any business transactions with the Siegel-Sanders Live Stock Commission Company?

A. Yes they did.

Q. State about when you commenced to deal with the Siegel-Sanders Commission Company, and what the nature of your business transactions.

A. I don't know just when we commenced to do business but we have bought paper from the Siegel-Sanders Live Stock Commission Company, amounting to from one to two hundred thousand dollars.

Q. With whom as the representative of the Siegel-Sanders Live Stock Commission Company, did you transact your business?

A. With Mr. Frank P. Swain.

Q. What relation if any did Mr. Frank P. Swain sustain to the Siegel-Sanders Live Stock Commission Company?

A. He was their representative in Chicago, and the Siegel-Sanders Commission Company, authorized him by letter to us to do business in their name.

Q. I ask you to look at the document now shown you and state from whom you received it?

141 A. We received it from Mr. Frank Siegel.

Q. What does that document purport to be?

A. Authority from the Siegel-Sanders Commission Co. to Mr. Frank P. Swain to do a banking business in their name.

By Mr. STRAWN: I will attach the document now shown the witness and which is in the words and figures following:

"To whom it may concern:

At a called meeting of the board of directors of the Siegel-Sanders Live Stock Commission Company held at the offices of the company in Kansas City Missouri, on Thursday, July 23rd, 1900, the following resolution was adopted:

'That Frank P. Swain is hereby appointed cashier of this company, in charge of the offices of this company at the Union stock yards, Chicago, Illinois.

'That he is hereby empowered to sign all checks, drafts and endorse all notes and legal documents which may require the signature of this company, on business transacted at our offices at the Union stock yards, Chicago, Illinois.'

The above is hereby certified as a correct copy.

FRANK SIEGEL, President.

F. P. SWAIN"

to the deposition of this witness as Plaintiff's Exhibit No. 12.

Q. There has been introduced in evidence a certified copy of the chattel mortgage purporting to have been given by W. B. Grimes, Jr., to the Siegel-Sanders Live Stock Commission Company under

date of October 24th, 1900, securing his two notes of like dates for the sums of $7033.24, and $7000 even, each, due six months after date and cover 633 head of native steer cattle. What if anything did you ever have to — as the representative of the Chicago Cattle Loan Co. with that chattel mortgage and the notes secured thereby?

142 A. I approved of the cattle loan company buying that paper with the chattel mortgage on the cattle as security for the same.

Q. At or about what time?

A. In October or the early part of November, 1900.

Q. What if anything did you do or did the Chicago Cattle Loan Company do to your knowledge, with respect to ascertaining the value of the security evidenced by the chattel mortgage, a certified copy of which is known as Plaintiff's Exhibit No. 1.

A. We sent out inspector there and had the property examined?

Q. What was the name of your inspector?

A. Mr. True, W. H. True.

Q. He was the same gentleman who has testified this morning in your presence?

A. Yes.

Q. Did you or did you not advance any money to the Siegel-Sanders Live Stock Commission Company at the time these notes and chattel mortgage, as you say, were discounted with the Chicago Cattle Loan Company?

A. Yes.

Q. How much did you advance?

A. We advanced the net amount of the two notes of about $7000 each after deducting interest.

Q. The interest at the rate prescribed in the notes and mortgage. This paper by its terms appears to have become due six months from October 24th 1900. What if anything did you do at the time of the maturity of the paper, or did the Chicago Loan Company do to your knowledge?

A. It was paid by the Siegel-Sanders Company, on April 27th, 1901.

Q. What if anything at the time of the purchase of this paper— by paper I mean notes secured by the mortgage, a certified

143 copy of which is introduced in evidence as Complain-t's Exhibit No. 1 did you have by information as to whether or not the mortgage aforesaid was or was not a first lien upon the cattle described therein?

A. It was so represented to us by the Siegel-Sanders Live Stock Commission Company. All paper taken from them was so represented, and we also relied upon the report of our inspector, Mr. C. H. True. He went there and reported in regard to the records.

Q. Subsequent to the — or at about the time of the maturity of the mortgage and notes, a certified copy of which mortgage is known as Plaintiff's Exhibit No. 1 to the testimony of C. H. True, did you

have any thing further to do with the Siegel-Sanders Live Stock Commission Company? If so, in what capacity? I mean now with reference to any papers or evidence of indebtedness made by W. B. Grimes, Jr.?

A. As president of the National Live Stock bank we discounted for Siegel-Sanders & Co. on April 27th, 1901, two notes of about $7000 each.

Q. Two notes bearing date April 17th, 1901 being for the sum of $7694.77 each and each being due and payable October 27th, 1901, with interest from maturity at the rate of seven per cent. per annum?

A. The said notes were secured by a chattel mortgage bearing date the 17th day of April, 1901 for $15389.54, securing the two notes about which I have just testified. The chattel mortgage was upon 606 head of cattle, 116 head being three year olds native steers, and 490 head being two year old native steers. This chattel mortgage appears to have been filed for record in the office of the register of deeds of Clark county, Kansas, on the 25th day of April 1901 and recorded in Book 6 of Records, at page 132, and which were represented to us as being the same cattle pledged in the
144 mortgage to the cattle loan company, and known as Plaintiff's Exhibit No. 1, to the deposition of Mr. True.

Q. State what if anything you gave to the said Siegel-Sanders Live Stock Commission Company on the said 27th day of April, 1902 in consideration for the two notes and the chattel mortgage which you have just described?

A. We credited their account with the amount of the notes less the discount.

Q. State what if any relation there is between the chattel mortgage made by Grimes and a certified copy of which is known as Plaintiff's Exhibit 1 to the deposition of the witness True and the chattel mortgage last referred to, securing two notes for the $7694.55 each, and recorded in Book 6 of Records at page 132 thereof?

A. A chattel mortgage last mentioned was given to take up or in place of the loan taken by the cattle loan company and represented by Plaintiff's Exhibit No. 1 to Mr. True's testimony, and it was so understood by the Siegel-Sanders Live Stock Commission Company and the bank.

Q. State what reasons if any there were why the Chicago National Live Stock bank took this loan from W. B. Grimes Jr., evidenced by the chattel mortgage bearing date April 17th, 1901, and recorded in Book 6 of Records at page 132?

A. Because as the officers of the Chicago Loan Company we had had this property inspected. It has been reported to us as a good loan, and because we had had our man personally examine the records to satisfy us beyond any doubt that the property described in the mortgage was clear of any liens except of the Chicago Cattle Loan Company, which was then being paid, and is represented by

the chattel mortgage, a certified copy of which is known as
145 Plaintiff's Exhibit 1 to Mr. True's testimony.

Q. At the time the National Live Stock bank discounted this paper of Grimes evidenced by the notes secured by the mortgage recorded in Book 6 of Records at page 132 and bearing date April 17th 1901, did the bank have any information either from the records or from any source whatever that there were any other liens upon the record prior to the lien evidenced by the mortgage described in this question?

A. They did not.

Q. When if at any time did the bank first learn, or did you, as an officer of the bank, first learn, that any one else claimed to have a lien against the property described in this chattel mortgage, other than the chattel mortgage dated April 17th, 1901, and recorded in Book 6 at page 132.

A. On receipt of a telegram from W. B. Grimes, bearing date May 21st, 1901.

Q. What was that telegram?

A. "Send good man here to protect your interests at once." Signed W. B. Grimes.

Q. Do you hold that telegram in your hands?

A. Yes.

By Mr. STRAWN: I will ask to have this telegram attached to the evidence of the witness as Plaintiff's Exhibit No. 13.

Q. You may look at the chattel mortgage bearing date April 17th, 1901, made by W. B. Grimes, Jr., to the Siegel-Sanders Live Stock Commission Company, securing the notes I have just shown you, and state whether or not you have seen that mortgage before?

A. Yes, this is a copy of the mortgage securing the notes which were discounted by the National Live Stock bank on the 27th day of April, 1901.

146 By Mr. STRAWN: In this connection I will also ask to have attached to the testimony of the witness a true copy of the chattel mortgage bearing date April 17th, 1901, from W. B. Grimes, Jr., to the Siegel-Sanders Live Stock Commission Company, securing his two notes for $7694.77 each, dated April 17th, 1901; and payable October 27th, 1901; said chattel mortgage being filed for record in the office of the register of deeds in Clark county, Kansas, on April 25th, 1901, and recorded in Book 6, at page 132 thereof. I ask that said certified copy be marked Plaintiff's Exhibit No. 14.

Q. You may look at the notes now shown you bearing date April 17th, 1901, for $7694.77 each, signed by W. B. Grimes, Jr., payable to the order of the Siegel-Sanders Live Stock Commission Company, October 27th 1901, and endorsed by R. D. Swain, treasurer, and state whether or not you have seen those notes before?

A. Yes. These are the notes which were discounted by the bank on the 27th day of April, 1901.

By Mr. STRAWN: I will also ask that there be attached as Exhibits Nos. 15 and 16 to the testimony of the said witness the two notes described in said chattel mortgage bearing date the 17th day of April, 1901, each for the sum of $7694.77 each, signed by W. B. Grimes Jr., and payable to the order of the Siegal-Sanders Live Stock Commission Company.

By Mr. STRAWN: I will reserve the original chattel mortgage and the notes to be introduced at the hearing. They may be marked now for identification by the stenographer as originals of Exhibits 14, 15 and 16.

Q. What if anything did you do after receipt of the telegram from W. B. Grimes under date of May 21st, 1901?

147 A. I came down town and sent Mr. James T. Meagher, of the firm of Winston & Meagher, to Ashland Kansas, to see what was the matter.

Q. State who at the time of the commencement of this suit owned the notes and chattel mortgage bearing date April 17th, 1901, the chattel mortgage being recorded in Book 6 on page 132 in the office of the register of deeds of Clark county, Kansas, and the notes being for $7694.77 each due October 27th, 1901?

A. The National Live Stock bank.

Q. State how long the said bank has owned said notes and chattel mortgage?

A. Since April 27th, 1901.

Q. You may state whether or not the said bank did prior to the time of the commencement of this suit, declare the indebtedness evidenced by the said notes and chattel mortgage last above referred to, to be due and payable?

A. We instructed our representative, Mr. James T. Maher when he left for Ashland, Kansas, to act for us in the matter, to do whatever in his judgment was necessary to protect the interest of the bank.

Q. Have the notes bearing date April 17th, 1901, for $7694.77 each or either of them or any part of them been paid to the said National Live Stock bank?

A. No.

LEVI B. DOUD.

FRANK P. SWAIN, of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination by Mr. STRAWN:

Q. You may give your full name and occupation.

148 A. Frank P. Swain, live stock commission.

Q. Where do you reside?

A. Chicago, Illinois.

Q. How long have you lived in Chicago?
A. Since August, 1900.
Q. Where did you live prior to that time?
A. Kansas City, Missouri.
Q. What if anything had you to do with the Siegel-Sanders Live Stock Commission Company in the years 1900 and 1901?
A. I was the manager of the Chicago office of the Siegel-Sanders Live Stock Commission Company.
Q. What is the Siegel-Sanders Live Stock Commission Company or what was it at that time?

Objected to as improper—which objection was by the court over ruled, to which the defendant excepted.

By Mr. STRAWN: They didn't make any objection then.

By the COURT: They have a right to make it now as to its competency.

A. A corporation under the laws of Missouri.
Q. In what business was it then engaged, during the years 1900 and 1901?
A. The live stock commission business.
Q. State where it had its office and principal place of business.
A. Kansas City Missouri.
Q. Who was the president of that company during those years?
A. Frank Siegel.
Q. What was you- connection with that company at Chicago during the year from July 23, 1900 to 1901?
A. I had charge of their business here from September 1st, 1900.

149 Q. What was the general nature of their business here?
A. We bought and sold cattle, hogs and sheep and negotiated loans.

Q. Did you ever have any business transactions as the representative of the Siegel-Sanders Live Stock Commission Company with the Chicago Cattle Loan Company?
A. Yes sir.
Q. Did you ever discount with the Chicago Cattle Loan Company any paper made or endorsed by W. B. Grimes Jr., secured by chattel mortgage or otherwise?

Objected to as immaterial, since the stipulation states that they had that transaction and the note is in existence and not paid.

Which objection was by the court overruled, to which the defendant excepted.

A. Yes.
Q. You have seen Plaintiff's Exhibit No. 1 attached to the deposition of the witness C. H. True, which is a certified copy of the chattel mortgage purporting to secure two notes, one for $7033.24, bearing date October 24, 1900 and due in six months and another for $7000 bearing the same date and also due in six months, and

ask you to state whether or not you ever had anything to do with that mortgage, of which Plaintiff's Exhibit 1 is a certified copy?

A. I recall having discounted such notes.

Q. With what officer — connection with the Chicago Cattle Loan Company did you make this discount?

A. I believe it was with Mr. R. X. Herrick, to the best of my recollection.

Q. State whether or not you at that time turned over to
150 Mr. Herrick the papers, that is to say, the chattel mortgage and the notes secured thereby.

A. I did.

Q. State what if anything you received at the time you discounted with the Chicago Cattle Loan Company the notes and mortgages, a certified copy of which mortgage is in evidence as Plaintiff's Exhibit No. 1, that is the cattle loan mortgage?

A. I received either a check of the Chicago Cattle Loan Company or received credit. Now you will see I have no recollection. I would not, without looking it up, tell if we got a check or whether we got credit for it.

Q. But the Siegel-Sanders Live Stock Commission Company either did receive credit or a check of the Chicago Cattle Loan Company for the $7033.21?

A. Yes sir.

Q. Now Mr. Swain I direct your attention to a certain other chattel mortgage which I hold in my hand and which is a mortgage purporting to have been given by William B. Grimes, Junior, Clark county, Kansas, to the Siegel-Sanders Live Stock Commission Company, securing two notes for the sum of $7694.77 each, and each bearing date April 17, 1901, and each payable by the terms thereof October 27, 1901. I will ask you to look at that mortgage, together with the two notes secured thereby, which I hold in my hand and which are numbered 1335 and 1336, and ask you to state whether or not you have ever seen those papers before?

A. I believe these to be the notes which I discounted.

Q. With whom?

A. The National Live Stock bank. These are the ones that were given last April?

151 Q. Yes.

A. Yes.

Q. State whether or not you received anything on account of these notes or the Siegel-Sanders Live Stock Commission Company received anything at the time these notes were discounted?

A. The account of the Siegel-Sanders Live Stock Commission Company received credit for the sale of these notes.

Q. What if anything did you do with the notes and chattel mortgage at the time you discounted them?

A. I delivered them to Mr. G. A. Ryther, the cashier.

Q. You may look at the endorsements on the back of those two notes and state in whose handwriting those endorsements are?

A. The endorsemnet of the Siegel-Sanders Live Stock Commission Company was made by R. D. Swain, treasurer.

Q. Do you know whether or not Mr. Swain was treasurer of the company at that time?

A. He was.

Q. You say in answer to the second last question that the Siegel-Sanders Live Stock Commission Company at the time those notes were discounted by you received credit from the National Live Stock bank, what do you mean by that?

A. I mean the National Live Stock bank credited to Siegel-Sanders Live Stock Commission Company's account, the amount of those notes, less the discount.

Q. Do you recall how much the discount was?

A. No, I have no recollection whatever.

Q. You may state if you know, in what manner the notes secured by the chattel mortgage, a certified copy of which is known as Plaintiff's Exhibit No. 1 to the witness C. H. True's testimony, were paid.

152 A. They were paid by the Siegel-Sanders Live Stock Commission Company by check on the National Live Stock bank.

Q. You may state if you know whether the mortgage, a certified copy of which is known in this record as Plaintiff's Exhibit No. 1, and the mortgage which has just been exhibited to you, bearing date as aforesaid on the 17 day of April, 1901, and recorded in Book 6 of Records at page 136 thereof, in the office of the register of deeds in Clark county, Kansas, were upon the same property, substantially the same.

By Mr. MARUM: We object as incompetent——

Which objection was by the court overruled, to which the defendant excepted.

A. My understanding is that the mortgage dated the 17th day of April, 1901, was secured by the same cattle that secured a mortgage dated October 24, 1900.

By Mr. MARUM: We object to what his understanding was.

Which objection was by the court sustained, to which the plaintiff excepted.

Q. And that is the mortgage dated October 24, 1900, the certified copy of which has been introduced in evidence as Plaintiff's Exhibit No. 1 to the deposition of C. H. True, is that right?

A. Yes sir.

Q. You may state whether you at the time you discounted this paper with the National Live Stock bank, knew that the First National Bank of Geneseo held, or claimed to hold, a mortgage upon the property described in the mortgage from Grimes to the Siegel-Sanders Live Stock Commission Company, bearing date April 17, 1901?

Objected to—overruled—exception.

A. I had no knowledge of any other mortgage being in existence on the cattle covered by the mortgage which was held by the
153 National Live Stock bank.

By Mr. MARUM: We object to the answer as not responsive to the question.

Which objection was by the court overruled, to which the defendant excepted.

Q. You are not now connected with the Siegel-Sanders Live Stock Commission Company?

A. I am not.

Q. When did you cease your connection with them?

A. On June 1st, 1901.

Q. I exhibit to you a certain authority purporting to come from the Siegel-Sanders Live Stock Commission Company and ask you to state whether or not you have seen theat paper before?

A. Yes, and it bears my signature.

Q. When did you first see that paper?

A. About September 11, 1900.

Q. What if anything did you do with that paper with reference to the National Live Stock Bank or the Chicago Cattle Loan Company?

A. After I had placed my signature on same it was delivered to the National Live Stock bank by Frank Siegel.

Q. Did you see this paper after it was delivered to the National Live Stock bank?

A. No sir, I believe not.

Q. Do you know that Frank Siegel delivered it to the bank?

A. Yes sir.

Q. State who, if any one aside from yourself, had charge of the business of the Siegel-Sanders Live Stock Commission Company in Chicago during the years 1900 and 1901?

154 A. There was no one besides myself in charge here.

Q. What did you do for them here?

A. I handled all of their financial affairs, made deposits, discounted their paper.

FRANK P. SWAIN.

By Mr. STRAWN: The exhibit attached to the witness Swain's testimony I have already read in evidence, and therefore I do not desire to read that. I assume that the certifications of the notary to these certificates need not be read.

By the COURT: Not necessarily, unless objected to, and those objections have to be urged before trial.

By Mr. STRAWN: I think that is all in the way of depositions that we desire to offer.

We also desire to have considered in evidence a certain portion of page 3 of the answer to the amended petition, filed herein by the

defendant on the 1st day of April, 1902, which said portion is in the words and figures following to wit:

"That after the execution and delivery of said promissory note as aforesaid, and before the maturity thereof, said Siegel-Sanders Live Stock Commission Company, by Frank Siegel, its duly elected, qualified and acting president, and being then and there duly authorized so to do, duly sold said promissory note to this defendant, for a valuable consideration to it paid by defendant, and duly endorsed the same on the back thereof, and delivered said note and the aforesaid mortgage to said defendant. That a true and correct copy of said note and the endorsements thereon, is hereto attached, made a part hereof and marked Exhibit "A" and that a true
155 and correct copy of said chattel mortgage is hereto attached, made a part hereof, and marked Exhibit "B" That defendant is now and has been ever since the sale and delivery of said note and mortgage, the owner and holder of the same, and is now the owner and holder of said note and mortgage given to secure the payment of said described note."

THORNTON W. SARGENT, a witness for the plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. EVANS:

Q. State your name and place of residence.
A. Thornton W. Sargent, Wichita, Kansas.
Q. How long how have resided at Wichita, Kansas?
A. Very nearly sixteen years.
Q. What has been your occupation since you have been in Wichita, Kansas?
A. Attorney at law.
Q. What courts in the State of Kansas have you practiced in during that period as attorney?
A. All of the courts.
Q. What if any schools are you a graduate of Mr. Sargent?
A. The law school of the Columbian college at Washington, D. C. and the literary department of the University of Michigan.
Q. During your experience as practitioner of the law in the State of Kansas, have you had occasion to examine the statutes, session laws and the decisions of the State of Kansas, construing the same respecting chattel mortgages?
A. I have.
Q. State whether or not you are familiar with the statutes, session laws and the decisions of the courts of the State of Kansas upon the same?
156 A. Yes sir.
Q. Look at the paper I hand you marked Exhibit "C," a part of the deposition of the witness Manfred Brown, and state Mr. Sargent whether or not in your opinion that instrument was, under

and by virtue of the law of the State of Kansas obtaining on the 24th day of November, 1900, and also on the 27th day of November, 1900, a good and sufficient release of the chattel mortgage therein described?

By Mr. YOUNG: If your honor please, he is calling for just what your honor is here to decide, the law in this case, the books themselves and the law on evidence and the law of chattel mortgages is the best evidence of what the law is.

By Mr. EVANS: If the court please, I am endeavoring to proceed with him as an expert.

By the COURT: I thought you stipulated on the evidence didn't you? Did you stipulate that the statutes, session laws and——

By Mr. YOUNG: Decisions——

By the COURT: Should be used as evidence?

By Mr. YOUNG: Of the supreme court and court of appeals.

By Mr. EVANS: We stipulate that they may be all used——

By the COURT: The objection will be sustained. The authorities hold that the law of a foreign State may be proven by persons who are familiar with it and have knowledge of it, and that is not calling for the law; you are not offering to prove the law by this witness, you are offering to take an expert opinion of him as to whether a certain instrument is a valid instrument.

By Mr. EVANS: As I understand the statutes of Oklahoma, they are as follows: "The unwritten or code law of any other State or foreign corporation, may be proved as facts by parole evidence, and the text of cases reported may be also admitted in evidence."

By the COURT: You are not seeking to prove the law.

157 After you prove what the law is the court will determine whether that is a valid instrument under the law.

By Mr. EVANS: As I understand it, the law of the State of Kansas on any proposition that may be advanced here is in this court a question of fact, and then in order for us to get before your honor the facts and the law of the State of Kansas as it existed, we have to bring evidence of some character in here. If there are statutes or decisions of our court which cover the identical point in issue, it is proper for us to introduce it, but if not, the statute gives us the right to introduce parole evidence.

By the COURT: You are not offering to prove the law by him, you are offering to prove whether this is a legal instrument or not.

By Mr. EVANS: Exception.

Q. You may state Mr. Sargent what the law of the State of Kansas was on the 24th day of November, 1900 and on the 27th day of November, 1900, respecting the release of chattel mortgages?

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial, the law is the best evidence—the session laws are the best evidence.

By the COURT: There is only one question—you introduced a

statute here, you didn't read it,—you introduced in evidence a whole article on the subject of chattel mortgages.

By Mr. YOUNG: And it was understood that they would read that.

By the COURT: I think that covers the question the gentleman is now inquiring about.

By Mr. EVANS: It does not cover it, if it did, we wouldn't want to prove it neither way. The law of the State of Kansas is silent upon the question as to whether or not within the State of Kansas
158 it is necessary to acknowledge a release of a chattel mortgage. I can prove that by Mr. Sargent if you desire, preliminary to this question.

By Mr. YOUNG: That is entirely a different proposition from the one you are asking the witness.

By Mr. EVANS: I think not.

Q. Question read by reporter.

By the COURT: What do you want to show by him, how a release should be executed?

A. Yes sir, I want to show under the laws of the State of Kansas obtaining at that time, it was not necessary to acknowledge it.

Q. By the COURT: I will sustain the objection.

By Mr. EVANS: Exception.

Q. You may state whether in your opinion on the 24th day of November, 1900 and the 27th day of November, 1900, it was necessary under the laws of the State of Kansas, to acknowledge the release of a chattel mortgage.

By Mr. YOUNG: We object to that, not that he might not be able to prove that fact, but we object to it because there is a statutory provision there for the release of chattel mortgages in the statutes, and that is the best evidence.

By the COURT: Objection sustained.

By Mr. EVANS: Exception.

Q. You may state whether under the law of the State of Kansas on the 24th, day of November, 1900, and the 27th day of November, 1900, it was nec[illegible]y to acknowledge the release of a chattel mortgage?

159 By Mr. YOUNG: We object to the proposition, because it is calling for the conclusion of this witness as to what the law is and the law is laid down here in the books, and that is just the proposition we are all the way down here to see your honor about.

By the COURT: Is that in the chapter that you introduced?

By Mr. MARUM: Yes sir.

By the COURT: You omitted the portion of the statute that referred to the satisfaction of real estate mortgages, didn't you?

By Mr. EVANS: Yes sir, that was shut out, it was offered and objected to, and shut out. That statute says it may be released in the same manner, as near as may be, and we want to show what that manner was.

By Mr. STRAWN: The statute provides in express terms that a chattel mortgage may be released in the same manner as a real estate mortgage; then it would be unnecessary to go beyond the statute to determine what the law is and what the custom is in the State of Kansas, but the chattel mortgage code provides that a chattel mortgage shall be released in the same manner as a real estate mortgage as near as may be. Now the real estate mortgage act provides that it shall be released in two ways, by filing a separate instrument or by words on the margin of the record, or in another way to enter the satisfaction on the instrument itself, and it is for that reason that we produce this witness to show how that statute has been construed and the uses and customs of the State of Kansas in reference to that statute in the matter of the release of chattel mortgages.

By Mr. MARUM: Here is the Oklahoma statute in the absence of the pleading thereon.

160 By Mr. EVANS: There is a stipulation on that subject, however.

Q. By the COURT: What is it you want to show, that it does not have to be acknowledged before an officer?

By Mr. EVANS: We want to show the manner in which a release of a chattel mortgage can be made in the State of Kansas and be effective at that time.

By the COURT: By what authority do you get it, is there some decision of the supreme court on the statutes?

By Mr. EVANS: By the construction that has been placed upon that section by the bar of the State of Kansas, and the custom among the practitioners; among those who have had dealings with chattel mortgage property. The law is well settled, although the question has never been presented to our supreme court. No one has ever raised the question but it is well settled——

By Mr. YOUNG: Where is it well settled?

By Mr. EVANS: In the State of Kansas.

By Mr. YOUNG: You say well settled, the supreme court hasn't settled it, and the statute has not settled it, I don't understand where it is well settled.

By Mr. EVANS: It has been settled wherever the question has arisen; there is no requirement that it be acknowledged, and the reason of it is where the requirement for it be acknowledged, that it will not be necessary: furthermore the general law is that an instrument or release must not be of any greater dignity than the instrument itself, and a chattel mortgage itself not having to be acknowledged, therefore on that principle, the release of it does not have to be acknowledged.

161 By Mr. YOUNG: The law does not require that the release be filed in Kansas at all, except as between the parties. The mortgagor can demand that, and he is the only party that can do that, and if he did not release it, he is under a penalty for not releas-

ing it, but there is no law that provides that the release shall be filed at all in satisfaction of a mortgage of chattels.

By the COURT: There is of chattels——

By Mr. YOUNG: That is as between the mortgagee and the mortgagor.

By the COURT: It says "Satisfaction shall be entered in the book in which—acknowledging satisfaction,"—of course that implies that it may be done by separate instrument,—"Shall not be recorded but filed and shall be referred to under the head of remarks and shall be filed in the office therewith, and filed in the office of the recorder of deeds—." There is a specific statement as to how it is done,—generally as separate instruments, but it may be done by entering upon the record.

By Mr. YOUNG: It says that satisfaction must be as near as can be like the satisfaction of a real estate mortgage, and a real estate mortgage act requires that an instrument that affects real estate, shall be acknowledged. Of course, if they don't want to offer the real estate law——

By Mr. EVANS: We offered it and you objected to it.

By Mr. YOUNG: You didn't call my attention or the court's to it.

By Mr. MARUM: That clause in the Kansas law which is different from ours is a protection to subsequent purchasers of mortgages on property, unless an affidavit of renewal is filed within 30 days before the expiration of a year,—they are protected. They did not allege our mortgage is——

162 By Mr. EVANS: And the right between these two parties in respect thereto will come up after the evidence is in, but we simply want to show that that release as filed would have been a good release of that mortgage then. Whether or not Mr. Siegel or the Siegel-Sanders Live Stock Commission Company have exceeded their authority and in doing so committed a fraud for which the defendant is not liable, is a question for the court to determine, but — we want to show is that that release was under the laws of the State of Kansas a good release.

By YOUNG: How could it be a good release when it is acknowledged by somebody else—the statute requires that it shall be acknowledged by the mortgagee or assignee.

By Mr. EVANS: No, but by this I am not asking this witness as to whether or not we are right in this controversy.

By Mr. STRAWN: We don't offer this testimony for that purpose; all we desire by introducing this testimony is simply to get the fact before the court that that would be a proper release, irrespective of the fact of whether or not the Siegel-Sanders Commission Company had any authority to execute it.

By Mr. YOUNG: Supposing the witness's answer would be "A proper release," then the court would have nothing further to say.

By Mr. STRAWN: All we desire to show is that this is a proper release as to form, as between the parties.

By the COURT: You have introduced in evidence here the statute

on the subject. You said to the court there has been no construction of it by the supreme court of the State of Kansas; if there is any law of the State of Kansas on the subject and the witness is familiar with it, I will permit you to prove it by him, but I don't understand you can go any further than to prove the law by him.

By Mr. EVANS: Where there is no written law, as your
163 statute expressly provides, we have a right to introduce evidence of the common law or unwritten law of a foreign state or territory. That is all I am seeking to do, and of course, if it was written, it would not come with- the purview of that section of the statute. If it was written and there were adjudications on it by the higher court, we would have the decision here, but under that section of your law, we are doing as it says, where there is no written law on the subject, to prove it by parole testimony.

By the COURT: The court has indicated to you what you can do.

Q. Question repeated by reporter.

Objected to as incompetent, irrelevant and immaterial and not the proper way to prove the laws of the State or Territory as contemplated by the statute.

By the COURT: I am inclined to think the objection is well stated. You are not asking him what the law is, you are attempting to prove a conclusion.

By Mr. EVANS: Exception.

Q. You may state, Mr. Sargent, in what manner releases of chattel mortgages could be made under the law of the State of Kansas on the 24th day of November, 1900 and the 27th day of November, 1900.

By Mr. YOUNG: Objected to for the same reason.

By the COURT: Sustained.

By Mr. EVANS: Exception.

Q. You may state what the law of the State of Kansas is and was on the 24th day of November 1900 and the 27th day of November 1900, as to the manner of releasing chattel mortgages within the State of Kansas.

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled, to which
164 the defendant excepted.

A. There were then three ways of releasing a chattel mortgage, one way by——

By Mr. MARUM: Objected to as not responsive——

By the COURT: I think the answer should be to the question, your answer is not responsive.

To which ruling of the court the plaintiff at the time excepted.

A. The law was that chattel mortgages should be released: First, by an entry upon the margin of the record by the mortgagee or by

an entry on the copy or by an entry on the original mortgage, or by a separate instrument, signed by the mortgagee.

Q. State whether or not when made on a separate instrument, the law of the State of Kansas at that time required that separate instrument to be acknowledged.

By Mr. YOUNG: Objected to as incompatent, irrelevant and immaterial.

Which objection was by the court overruled, to which the defendant excepted.

A. No sir, it did not.

Q. You may state, Mr. Sargent, what kind of a separate instrument was required under the law of the State of Kansas on the 24th day of November, 1900 and the 27th day of November, 1900, to release a chattel mortgage upon property in that State?

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial.

Which objection was by the court sustained, to which the plaintiff excepted.

Q. You may state what the law of the State of Kansas was on the 24th day of November, 1900, and on the 27th day of Novem-
165 ber, 1900, as to the manner of releasing a chattel mortgage by a separate instrument.

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial.

Which objection was by the court overruled, to which the defendant excepted.

A. It was that the separate instrument should properly refer to the mortgage released and be signed by the mortgagee.

Q. Is that all?

A. That is all.

Q. Look at the paper I now hand you, marked Exhibit "C" and state whether or not that instrument is in proper form by the law of the State of Kansas on the 24th day of November, 1900, and the 27th day of November, 1900, to release the chattel mortgage therein described?

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial

Which objection was by the court sustained, to which the plaintiff excepted.

Q. You may look at the paper I now hand you, marked Exhibit "C" and state what the law was in the State of Kansas on the 24th day of November, 1900, and the 27th day of November, 1900, respecting the sufficiency of Exhibit "C" as a release of a chattel mortgage?

By Mr. YOUNG: Objected to as incompetent, irrelevant and immaterial.

Which objection was by the court sustained, to which the plaintiff excepted.

166 Cross-examination by Mr. YOUNG:

Q. Where did you get this law that you have undertaken to testify about here, was it common law or statute law or decisions of the supreme court?

A. It is what you might call the common law of Kansas, if there can be such a thing as that, it is not the common law of England.

Q. Where is that common law exercised in Kansas?

A. It is the practice and expression of the lawyers in the part of Kansas where I live, in respect to the law and the construction that they place upon it.

Q. You have stated Mr. Sargent that if such a release was signed by the mortgagee, that the mortgage would be released, regardless of who owned it or who controlled it or who was interested in it?

A. Yes sir, that would under some qualifications, of course.

Q. Give us the qualifications.

A. That release would be good as against the parties.

Q. What parties do you mean?

A. I mean it would be a good release of a mortgage as between the mortgagor and the mortgagee.

Q. How about an assignee?

By Mr. EVANS: Objected to as incompetent and improper cross examination.

Which objection was by the court overruled, to which the plaintiff excepted.

A. Do you mean a subsequent assignee or prior assignee?

Q. I mean an assignee of a chattel mortgage; we are talk-
167 ing about the assignee of a chattel mortgage, the owner of the note at the time it was released, the assignee of the note?

A. The assignee of a non-negotiable instrument, the release would be good as to him.

Q. How about the assignee of a negotiable instrument?

By Mr. EVANS: Objected to as incompetent and improper cross-examination.

Which objection was by the court overruled, to which the plaintiff excepted.

A. As between the mortgagee and the assignee of a negotiable instrument secured by chattel mortgage, the release would not be good in my judgment.

Q. I will ask you if an assignee of a chattel mortgage of a negotiable promissory note, could release it of record under the law you have stated?

By Mr. EVANS: Objected to as incompetent and improper cross examination,——

Which objection was by the court overruled, to which the plaintiff excepted.

A. Is the assignee an assignee of record?

Q. I am asking you the law now.

A. If he is the assignee of record, the assignee can release it; if he is not the assignee of record, he cannot.

Q. Where do you get such law as that?

A. The construction that is placed upon the statutes of Kansas.

Q. Is there any statutes of Kansas that require the assignment of a chattel mortgage to be recorded?

By Mr. EVANS: Objected to as incompetent and improper cross examination,——

Which objection was by the court sustained, to which the
168 defendant excepted.

Q. Where do you get the law that you have just said was the law?

A. As I told you it is the construction that is placed upon the statutes of the State of Kansas.

Q. By whom?

A. By lawyers of the State of Kansas, and by the supreme court.

Q. Do you remember what case in the supreme court?

A. Not especially now, but I know, taking the construction as placed upon the chattel mortgage law by our supreme court, and the statutes of Kansas and the construction placed upon them by the lawyers, that that is the law.

Q. Is that as to chattel mortgages?

A. Yes sir.

By Mr. EVANS: I now offer in evidence the decision of the supreme court of the State of Kansas in the case of H. W. Ellis *vs.* Mary E. Carr, in the 28th Kansas, at page 365, # page 497.

By Mr. YOUNG: Objected to because that relates to real estate and not personal property.

By Mr. EVANS: We contend that the same principle is involved. This relates to a chattel mortgage, but we contend that the principal involved in it is just the same, and under the construction placed upon it in that case, there is abundant ground for saying that the law of the State of Kansas relating to chattel mortgages, is the same.

By the COURT: The objection will be sustained.

The plaintiff offers in evidence the decision of the supreme court of the State of Kansas in the case of J. Thomas *et al.*, partners as the Citizens Bank, *vs.* A. E. Reynolds, reported in the 29th Kansas, at page 216, # page 304.

By Mr. YOUNG: Objected to as incompetent, irrelevant and
169 immaterial.

By Mr. STRAWN: This is the construction of the chattel mortgage law in a chattel mortgage case.

By Mr. MARUM: I think, your honor, that is the law making it a crime for any body but the holder of a chattel mortgage to release it.

By Mr. STRAWN: When I offered that chapter as a whole, counsel objected because it was passed subsequent to the execution of these mortgages.

By the COURT: What was the date of the release?

By Mr. STRAWN: November 24, 1900.

By Mr. MARUM: It shows at least, if anything of that kind was the custom, that the people represented by the legislature did not concur in it.

By Mr. EVANS: That was six months after it happened.

By the COURT: In the case before us, it presents just the reverse of this; here there was a satisfaction made by a party to the record, who had, so far as the showing now goes, no interest in the mortgage at the time they made it. I don't see that this throws any light on the subject.

By Mr. EVANS: The only object of our endeavoring to introduce that is to show that under the law of the State of Kansas, it was proper for an assignee to have filed his release of record.

By the COURT: The objection will be sustained.

To which the plaintiff excepts.

The plaintiff here rests.

170 The defendant offers in evidence the note dated June 27, 1900, payable November 1, 1900, for $11111.23, at 8 per cent. after maturity signed W. B. Grimes, Jr. with the endorsement "for value received we hereby assign this note to —— —— or order and waive demand, notice, protest of same, and guarantee the payment thereof at maturity. Siegel-Sanders Live Stock Commission Company, by Frank Siegel, Pt."

We also offer the endorsement on the note "The mortgage securing this note is duly stamped according to law."

The same is here marked Exhibit "F," and there being no objection the same is as follows to wit:

Siegel-Sanders Live Stock Commission Company.

Capital Stock, $250,000.00.

Rooms 73–74–75 Live Stock Exchange.

KANSAS CITY, Mo., June 27th, 1900.

November 1, 1900 after date I, we or either of us, promise to pay to the order of Siegel-Sanders Live Stock Commission Company, at

their office, eleven thousand one hundred eleven & 23-100 dollars $11111.23. With interest from maturity at the rate of 8 per cent. per annum until paid. Value received.

W. B. GRIMES, JR.

No. 604. Due ——.

Endorsed: "For value received, we hereby assign this note to —— —— or order, and waive demand, notice and protest of same, and guarantee payment thereof at maturity. Siegel-Sanders Live Stock Commission Comp. By Frank Siegel, Pt."

"The mortgage securing this note is duly stamped according to law."

171 By Mr. YOUNG: I will also offer the chattel mortgage dated June 27, 1900, and ask that the mortgage be marked Exhibit "G" with its endorsements thereon.

There being no objection, the same is admitted, and it is — follows:

Know all men by these presents: that W. B. Grimes Jr., of the county of Clark, State of Kansas, party of the first part, in consideration of the sum of eleven thousand, one hundred eleven & 23-100 dollars, paid by Siegel-Sanders Live Stock Commission Company, a corporation, party of the second part, the receipt whereof is hereby acknowledged, have sold, assigned and delivered, and by these presents does sell, assign and deliver unto said second party, all the following article- of personal property, situated in the county of Clark and State of Kansas, to wit:

(526) five hundred twenty six head of cattle as follows:

(443) four hundred forty three head of native full aged one year old steers.

(83) eighty three head of native full age one year old steers.

All of the above cattle branded thus:

Being all the cattle owned by me in this brand, and being the same cattle now being held and grazed by themselves in my enclosed pasture, located near Ashland, in Clark county, Kansas, where they are to be held and are not to be moved or sold without notice to and the written consent of said second parties.

And being all the property of the above description owned or controlled by the mortgagor now on said premises, and this mortgage is intended to cover and include all of said property of the above description and any addition and increase thereto, located
172 on the above described premises and range, if any thereabouts. The marks and brands used above to describe said property are the holding marks and brands and carry the title, although said property may have other marks and brands. If the mortgagor should desire to mix any other property with the above, before doing so, he shall give a full description of said property intended to be so mixed, with the name of the owner thereof, to said

second party and obtain the written consent of said second party before mixing the same. This mortgage shall also cover and include all the right, title and interest of the mortgagor in and to the pasturage, feed pens, feed troughs and water privileges used in feeding said live stock. Said property to remain and be kept on the premises above described until the full payment of the indebtedness hereinafter described, unless sooner marketed or removed by and with the written consent of the mortgagee or its assigns. When marketed said cattle are to be shipped and consigned for sale to Siegel-Sanders Live Stock Commission Company, at the Kansas City stock yards, and when sold the proceeds thereof shall be applied first in payment of the usual and customary commissions to said Siegel-Sanders Live Stock Commission Company for selling the same, and the balance, or so much thereof as may be necessary, shall be applied on the indebtedness hereinafter described. If said cattle or any part thereof, be consigned or sold elsewhere than above, then said mortgagee shall be paid a commission of 50 cents per head on all the above described cattle.

Provided always, and these presents are upon this express condition that if said party of the first part shall pay or cause to be paid unto the said party of the second part, the aforesaid sum of eleven thousand one hundred eleven & 23–100 dollars ($11111.23) according to the terms of one certain promissory note as follows:

173 One note for $11111.23 dated June 27th, 1900 payable November 1st, 1900, after date.

All payable at the office of said Siegel-Sanders Live Stock Commission Company, Kansas City and all with interest thereon at the rate of 8 per cent. per annum from maturity or according to the terms of any renewal of said indebtedness which may be made by consent of said second party, its successors or assigns, and may be evidenced by the execution of a new note or notes in place of said original indebtedness at or after maturity, for the amount of the debt then unpaid and payable hereunder, and for which this mortgage is and shall be a continuing security until paid, whether said debt be evidenced by said original indebtedness above described or any renewals or extensions thereof, and which said indebtedness the party of the first part hereby agrees to pay on the maturity thereof, then these presents and everything herein contained shall be void, anything herein contained to the contrary notwithstanding. And it is hereby mutually covenanted and agreed between the parties hereto, that if default be made in the payment of said sum of money or any part thereof, or the interest thereon, according to the tenor and effect of said indebtedness, when the same became due and payable, and upon a failure to conform to or comply with any of the conditions and agreements herein mentioned, then the whole sum of money hereby secured shall at the option of the party of the second part, or the legal holder or holders of said note or notes, become due and payable at once without notice. And it is further agreed that in case of sale or disposal or attempt

to sell or dispose of the goods and chattels hereby mortgaged or a removal of, or attempt to remove the same from the premises aforesaid, or an unreasonable depreciation in value, or if from any other cause the security shall become inadequate, or the party of the second part shall deem itself
174 insecure at any time before said indebtedness is fully paid, whether the same be due or not, then and thenceforth it shall be lawful for the said party of the second part, its successors or assigns or its authorized agent, to enter upon the premises of the said party of the first part, or any other place or places wherein said goods and chattels or livestock aforesaid may be, to remove and dispose of the same, as aforesaid without resort to law, and without appraisement or notice (all right of redemption appraisement and notice of foreclosure required by law being hereby expressly waived), and all the equity of redemption of said party of the first part, at public auction or private sale, to the person or persons who shall pay the highest price for the same, and out of the avails thereof to retain the full amount of said obligation, with the interest thereon, according to the conditions thereof, together with all reasonable costs and expenses attending the same and conditions aforesaid, rendering to said party of the first part, or his legal representatives, the surplus money, if any there shall be, anything herein to the contrary notwithsatanding.

And until default be made as aforesaid, or until such time as the said party of the second part shall deem itself insecure as aforesaid, the said party of the first part to continue in the peaceable possession of all said goods and chattels, all of which in consideration thereof, he agrees, shall be kept in as good condition as the same now are, and taken care of at his own proper cost and expense, and upon the neglect or failure of said first party so to do, then said second party, its successors or assigns, may cause the same to be done, and for all expenses so incurred and sums expended, this obligation shall be a continuing security; and if from any cause said property shall fail to satisfy said debt and interest aforesaid,
175 said party of the first part hereby agrees to pay the deficiency.

For the purpose of obtaining the money at this time loaned by the second party and the benefit of future transactions, the first party states that the first party is the absolute owner of all of the above described property; that the same is free from any incumbrances, and that all of the same is now in the possession of said first party at the location.

In witness whereof, the party of the first part have hereunto set their hand and seal this 27th day of June in the year of our Lord, one thousand nine hundred.

W. B. GRIMES, Jr.

Signed, sealed and delivered in the presence of
M. G. STEVENSON.

STATE OF KANSAS, } ss.
County of Clark, }

Be it remembered, that on this fifth day of July A. D. 1900, before the undersigned, a notary public duly commissioned and acting as such within and for the county of Clark, aforesaid, personally came W. B. Grimes Jr. to me well known to be the grantor described in and who executed and whose name is subscribed to the foregoing instrument of writing as party thereto, and stated and acknowledged to me that he executed the same as his free act and deed for the purposes and considerations therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in Ashland in said county the day and year first above written.

My term of office as notary public will expire Oct. 5, 1904.

[SEAL] M. G. STEVENSON,
Notary Public.

(Officer taking acknowledgement should see that it is in proper form.)

176 Endorsed: No. 604. Chattel mortgage. From W. B. Grimes, Jr., Clark county Kansas, to Siegel-Sanders Live Stock Commission Company.

STATE OF KANSAS, } ss.:
Clark County, }

A copy of this instrument was filed for record on the 12 day of July A. D. 1900 at 8 o'clock a. m. and duly recorded in Book 6 of M. at page 127.

MANFRED BROWN,
Fee, $0.25. Register of Deeds.

Siegel-Sanders Live Stock Commission Co.

Capital Stock, $250,000.00.

Live Stock Exchange, Kansas City, Mo.

Due—Renewal affidavit filed June 20, 1901.
Security—Steers, 526. Cows —; heifers —; calves —; bulls —; $11111.23.
Due 11-1-4-1900.
(Rev. $5.25.)

177 By leave of court, the original instruments introduced in evidence by the respective parties, may be withdrawn, and copies substituted in lieu thereof.

By Mr. YOUNG: I don't hardly deem it necessary to read all of

these sections of the statute that has been offered in evidence here; as I understand they have been offered.

The defendant here offers in evidence the citation of the case of Burhans *vs.* Hutchison 25 Kansas, page 625, and the case of Swenson *et al. vs.* Moline Plow Co. *et al.* 14 Kansas, page 387.

By Mr. EVANS: Objected to as incompetent, irrelevant and immaterial, and not tending to prove any issue in the case, and not a proper way to show the law of the State of Kansas.

By the COURT: Have you got the volume of the Kansas reports you are offering this case from?

By Mr. YOUNG: No sir, I haven't but a portion.

By the COURT: Have you got the syllabus of the cases?

By Mr. YOUNG: No sir, I expected to find the Kansas reports here, but didn't find them. I also desire in connection with this section 4246, to offer the case of the Farmers and Merchants Bank of Cawder City *vs.* Bank of Glen Elder, reported in the 26 Kansas, at page 377, 26 Pac. 680 and the case of Howard *vs.* Bank, 44 Kansas 549, 24 Pac. 983.

By Mr. EVANS: Objected to as incompetent, irrelevant and immaterial, not tending to prove any issue in this case, and not a proper way to prove the laws of the State of Kansas, and not properly authenticated——

Upon which objection and the objection last preceding, there was no ruling by the court.

Said citations and opinions are as follows, to wit:

178 Eli Burhans *vs.* Josiah C. Hutcheson *et al.*, 25 Kans., 625.

1. Note and mortgage—When payment of—No discharge of.—Where a mortgage on real estate is given to secure the payment of a negotiable note, and before the maturity of the note the note and mortgage are transferred by indorsement thereon to a *bona fide* holder, the mortgagor, although having no notice whatever of such assignment and transfer, cannot thereafter pay off the note or mortgage to the mortgagee so as to defeat the real owner and holder thereof from recovering. Such a holder takes the mortgage as he did the note.
2. Payment to payee of notes and mortgage; recovery by *bona fide* holder.—H. executed to B., on February 25, 1873, two negotiable promissory notes payable to B. or order, for $500.00 each, one payable November 1, 1874, and the other November 1, 1875, with interest at the rate of seven per cent. per annum. To secure the payment of the notes, H. and wife on October 20, 1873, executed to B. a mortgage on real estate. Before the maturity of either of said notes, they were duly assigned by indorsement thereon to one E. who is the *bona fide* owner and holder of the notes and mortgage. On the 9th of March, 1875, without the knowledge or consent of the owner and holder of

the notes, H. and wife executed to the original payee in full payment and satisfaction of the notes, a conveyance of seventy acres of the land embraced in the mortgage, supposing such mortgagee to be the owner of the notes and mortgage, upon his statement that the notes were in his possession, at his home, and that he would destroy them. *Held*, that as the payee was not the holder of the notes and mortgage and had no possession of them, and was not entitled to receive money or other property in payment therefor, the conveyance of the land to him did not pay or discharge the notes or mortgage, or prevent the *bona fide* holder from recovering thereon.

3. Mortgage—How not discharged—After certain negotiable notes, payable to the order of B., and a mortgage on real estate,
179 executed by H. to secure the same, had been duly transferred by endorsement thereon before maturity, the mortgagor, without actual notice of such transfer, made a conveyance of land to the mortgagee to pay the notes and satisfy the mortgage, without the knowledge or consent of the real holder and owner of the notes and mortgage; and thereafter the mortgagor and mortgagee went together to the office of the register of deeds in the county where the mortgage was recorded, and procured the register to write a discharge and satisfaction of the mortgage on the margin of the record, which was signed by the mortgagor, and attested by the register of deeds. Held, that such entry, not being signed by the mortgagee or his attorney, assignee or personal representative, was no discharge or release of record of the mortgage pursuant to the statute, and at most, as to third parties, was a mere written statement on the part of the mortgagor in favor of his own interest that he paid the mortgage which could not prejudice the rights of the *bona fide* holder of the notes secured by such mortgage.

(Comp. Laws of 1879, ch. 68, pp. 5.)

4. Assignment of mortgage—Need not be recorded—When.—The *bona fide* holder of negotiable paper, transferred to him by indorsement thereon before maturity, and secured by real estate mortgage, need not record the assignment of the mortgage, or bring home to the mortgagor, actual notice of such assignment, in order to protect himself against payments made after the assignment without his knowledge or consent by the mortgagor to the mortgagee.

5. Assignment of mortgage—Record of.—Sec. 3, ch. 68, Comp. Laws of 1879, may be interpreted as having application to mortgage standing alone, or those securing debts and notes of a non-negotiable character only. With this interpretation the
180 statute is not nugatory, and has ample room for operation, without bring extended to mortgages given to secure negotiable paper transferred by endorsement thereon before maturity.

Error from Douglas District Court.

Action brought by Burhans against Hutcheson and four other-, upon two promissory notes and a mortgage. Trial by the court at the October term, 1878, and judgment for the defendant. The plaintiff brings the case here. The opinion states the facts.

B. J. Horton, for plaintiff in error.
S. O. Thatcher, for defendant in error Farwell.
John Hutchings, for defendant in error Willard.

The opinion of the court was delivered by HORTON, C. J.:

This was an action brought by plaintiff against the defendants to recover upon two negotiable promissory notes, and to foreclose a mortgage upon real estate given to secure their payment. The case was submitted to the court without a jury, and the findings of fact are substantially as follows:

On the 25th day of February, 1875, J. C. Hutcheson executed and delivered to Taylor Brandon two promissory notes, payable to Brandon or order, for the sum of $500 each—one of them payable November 1, 1874, and the other —— 1, 1875, with interest at the rate of seven per cent. per annum.

On the 20th day of October, 1873, to secure the payment of the notes, J. C. Hutcheson and E. J. Hutcheson, his wife, executed and delivered to Brandon a mortgage on the southeast quarter of section 12, and the east half of the northwest quarter of section 13, in township 15, range 18, each, lying in Douglas county. The mortgage was duly recorded on the 20th day of October, 1873, in the office of the register of deeds of Douglas county. Before the maturity of either of said notes they were duly assigned by the indorsement thereon of the name of the payee, Taylor Brandon, and delivered to Eli Burhans, the plaintiff in this action, who has ever since been the holder
181 and owner of them. The notes are fully due and unpaid, (except $65 paid October 20, 1873) other than as hereinafter alleged. On the 9th day of March, 1875, J. C. Hutcheson and wife executed and delivered to Taylor Brandon a warranty deed (recorded August 10, 1875) conveying to Brandon a portion of the mortgaged premises, to wit: the north sixty acres of the southeast quarter of section twelve, and the west quarter of the east quarter of the northwest quarter of section thirteen, in township fifteen, range eighteen; and it was agreed between Hutcheson, mortgagor, and Brandon, mortgagee, at the time, that the conveyance of the seventy acres should stand in full payment and satisfaction of the two $500 notes and mortgage hereinbefore described as having been given by Hutcheson to Brandon. At the time of the execution of the deed to the seventy acres of land, Brandon represented to Hutcheson that he was in possession of the notes and mortgage from Hutcheson to himself and that they were at his house, about five miles from Lawrence, and that he would destroy them or bring them to him. Hutcheson, at that time, had no knowledge or information that Brandon had

transferred the notes and mortgage to plaintiff. They went together at the same time to the office of the register of deeds for Douglas county, and procured the register to write a discharge of the mortgage on the margin of the record in words and figures as follows: "For value received, I hereby acknowledge full payment and satisfaction of the within mortgage, and discharge the same of record. Witness my hand this 9th day of March, 1875.—J. C. Hutcheson. Attest: D. W. Littell, register of deeds;" which was signed by J. C. Hutcheson, he and Brandon believing that to be the proper way to execute a discharge. Hutcheson supposed the notes and mortgage destroyed until about the commencement of this action, not having seen them since October 20, 1873. At the time of the conveyance of the seventy
182 acres on March 9th, 1875, by Hutcheson to Brandon, Hutcheson was in the actual possession, under a warranty deed, of the whole two hundred acres, included in the mortgage of October 30, 1873, and has continued to occupy with his family the remaining one hundred and thirty acres to the time of the trial, being the sole occupant thereof, and cultivating the same. Taylor Brandon went into possession of the seventy acres deeded to him March 9th, 1875, and continues to occupy it. At the execution of the deed from Hutcheson to Brandon, March 9, 1875, of the seventy acres, Brandon was not the owner of, nor in possession of, the notes or mortgage, or either of them, and did not and never has produced them, or either of them, though often requested and frequently promising to do so; but at that date the plaintiff, Eli Burhans, was the owner and in possession of the notes and mortgage, and has no knowledge of the agreement between Hutcheson and Brandon for the conveyance of the seventy acres in payment or satisfaction of the notes and mortgage, or of any agreement or of any attempt to discharge the mortgage on the record. Upon the 31st day of July, 1875, Hutcheson and wife executed a mortgage upon the one hundred and thirty acres remaining to them, after deeding the seventy acres to Brandon, to the Sullivan Savings Institution, to secure the payment of $1000 and interest at twelve per cent. per annum; the mortgage was recorded on the same day. Upon the second day of October 1877, Hutcheson and wife executed, as satisfaction of the mortgage to the Sullivan Savings Institution, a quit claim deed to the one hundred and thirty acres, to defendant John W. Farwell, and the deed was recorded on the third day of October, 1877, and Farewell paid the full value of the land in good faith, and the Sullivan Savings Institution acted in good faith. Brandon, upon the 4th day of October, 1875, executed a mortgage upon the seventy acres deeded to him by
Hutcheson and wife, to D. L. Hoadley, to secure a note of the
183 sum of $300 and interest at 12 per cent. per annum, dated also October 4th, 1875, given for money loaned by Hoadley to Hutcheson; the mortgage was recorded on the same day; the note and mortgage were subsequently and before maturity, for value received, indorsed and delivered to William B. Willard, who is now the owner and holder thereof, and there is now due on the note and

mortgage, from Brandon to Wm. B. Willard, the sum of three hundred and twenty two and 80-100 dollars, and a further sum of fifty dollars as an attorney's fee for the foreclosure of said mortgage.

Upon the foregoing findings, the trial court decided the notes set forth in the petition to be paid and the mortgage null and void; that William B. Willard was entitled to the first lien on the seventy acres deeded by Hutcheson to Brandon on March 9th, 1875, and that John L. Farwell was the legal owner of the 130 acres deeded him on October 2nd, 1877.

As the entry upon the book of mortgages in the office of the register of deeds of Douglas county, on March 9th, 1875, was signed by the mortgagor, instead of the mortgagee, or any party representing him, such entry was, as to third persons, a mere written statement on the part of the mortgagor, in favor of his own interest, that he had paid the mortgage of October 20th, 1873, given by him to secure the notes delivered to Brandon, but did not discharge or release of record, pursuant to the statute, such mortgage. (Comp. Laws of 1879, ch. 68 pp. 5.)

The principal question, therefore, in the case is, whether the conveyance of the 70 acres of land by Hutcheson to Brandon on March 9th, 1875, was a payment of the notes and a valid satisfaction of the mortgage, no actual notice having been brought home to the former of the assignment before maturity of the notes and mortgage to plaintiff. The court below seems to have held the conveyance a full payment and satisfaction of the mortgage. From the conclusions of
184 law stated, the court must have decided that where a negotiable note is secured by mortgage on real estate, and both are assigned by indorsement thereon before maturity to a *bona fide* purchaser, the mortgage is taken subject to all payments made by the mortgagor to the mortgagee at any time before actual notice to the mortgagor of such assignment. Counsel for defendants claim this to be the law, and have cited many respectable authorities in support thereof. We think the doctrine thus announced not sustained by reason or sound policy, and if adopted, it would be an unfortunate obstacle to commercial transactions so common in this State as the sale and transfer of negotiable paper secured by real estate mortgages, and that such a doctrine is not in accord with the previous decisions of this court controlling the principles of law applicable to negotiable paper secured by such mortgages. In this State, the common law attributes of mortgages have been by statute wholly set aside, and the ancient theories concerning such mortgages demolished. The mortgage is a mere security, creating a lien upon the property, but vesting no title. The debt secured by the mortgage is the principal thing, and the mortgage the mere incident following the debt wherever it goes, and deriving its character from the instrument which evidences the debt. Here, the negotiable notes are the principal evidence of the debt, and the mortgage is merely ancillary; the mortgage follows the notes; whoever owns the notes,

owns the mortgage. (Chick *v.* Willets, 2 Kas. 385; Swenson *v.* Plow Co. 14 Kas. 387) In the sate case of Carpenter *v.* Longan, 16 Wall. 271, Mr. Justice Swayne speaking for the court says:

"The note and mortgage are inseparable. The former is essential, the latter is an incident. An assignment of the note carries the mortgage with it, while the assignment of the latter alone is a nullity. * * * All the authorities agree that the debt is the
185 principal thing, and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same right in regard to both. There is no departure from any principal of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid, the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action where no such relation of dependence exists."

Counsel for defendants say, that conceding the correctness of the general doctrine laid down in Carpenter *v.* Longan, *supra*, yet, the adoption of *pp.* 3, ch. 68, Comp. Laws of 1879, has placed a legislative restriction upon the negotiability of all mortgages executed since its adoption, and that this statute thrown upon the assignee of negotiable paper secured by real estate mortgages, the burden of personal notification to the maker of the mortgage of the change of ownership, if he would cut off future payments to the mortgage. Our attention is called to Johnson *vs.* Carpenter, 7 Minn. 176, and to Van Keuren *v.* Corkins, 66 N. Y. 77, interpreting a statute like ours. In Johnson *v.* Carpenter, the mortgage is treated as a chose in action standing alone. In Van Jeuren *v.* Corkins, the suit was upon a bond and mortgage, and it does not appear that the bond was negotiable. However, Johnson *v.* Carpenter, and the other authorities referred to in the same direction, are not satisfactory to us, or rather, they are not in harmony with the laws of mortgages in this
186 State. Section 3 speaks of the recording of the assignment of the mortgage, and does not by its terms refer to negotiable paper, and it seems to us a strained interpretation to hold its provisions applicable, where a debt is evidenced by a negotiable note, secured by mortgage upon real estate, when such mortgage is merely ancillary thereto, and follows the note wherever it goes, deriving its character from such instrument. A better interpretation, and one clearly more in accord with the law of mortgages in this State, is, that such section has reference only to a mortgage standing alone, or one securing debts and notes of a non-negotiable character. Under this interpretation, *pp.* 3 of the statute is not negatory, but has ample room for operation. As Brandon had parted with all his

interest in the notes and mortgage before accepting the conveyance from Hutcheson and wife, and had no interest therein at the time, such conveyance did not extinguish the mortgage held by plaintiff; nor was it necessary for the plaintiff to record an assignment of the mortgage to protect himself from the payment to the mortgagee. The notes and mortgage went together, and the mortgagor, having made the conveyance and payment, without a surrender of the notes or the mortgage, did so at his peril.

The judgment of the district court will be reversed, and the case remanded with directions to enter judgment for plaintiff for the amount due him upon the notes, and for a foreclosure of his mortgage, in accordance with the views herein expressed.

All the justices concurring.

187 Samuli O. Swenson *et al. v.* The Moline Plow Company and C. M. Albinson.

Parties plaintiff; misjoinder; separate interests.—Where S. executed to A. two promissory notes, and a mortgage on real estate to secure the payment of the notes, and A. afterward assigned one of the notes to M., held that A. and M. cannot sue jointly as plaintiffs on the notes and mortgage, but each has his separate action.

Error from Cloud District Court.

The only question here is, as to the right of two or more parties respectively owning and holding separate notes secured by the same mortgage to join as parties plaintiff in an action on said notes and mortgage. The district court, at the August term, 1873, held that such joint action could be maintained, and gave judgment accordingly. Swenson and Swenson, the defendants, appeal, and bring the case here on error.

James Ketner, and C. W. McDonald, for plaintiffs in error.

Strain & Wells, for defendants in error.

The opinion of the court was delivered by VALENTINE, J.:

This was an action on two promissory notes and a mortgage. The facts in the case are substantially as follows:

The plaintiffs in error, Samuli O. Swenson and John P. Swenson, executed to the defendant in error, C. N. Albinson, two promissory notes and a mortgage on real estate to secure the payment of the notes. Afterwards Albinson assigned one of said notes to the other defendant in error, The Moline Plow Company. The notes were not paid at maturity, and this action was commenced by Albinson and the Moline Plow Company *jointly* against the Swensons to recover the amounts which they respectively claimed on said notes and mortgage.

The only question which we are asked to decide is, whether
188 a *joint action* may be maintained by the two plaintiffs below, or whether each had his separate action. In this State the

debt secured by a mortgage is the real subject of the action; the note given therefor is the principal evidence thereof, and the mortgage is merely ancillary thereto. The mortgage follows the note. Whoever owns the note, owns the mortgage. When the note is paid the mortgage is paid. When the action on the note is barred, by the statute of limitations, the action on the mortgage is also barred. Indeed, any defense that may be set up against the note, may be set up against the mortgage. But there is no separate action on the mortgage. The action must always be on the note, and it may be on the note either with or without the mortgage. And the action on the note, whether with or without the mortgage, is, so far as the note is concerned, substantially an action at law. The action is tried, so far as the note is concerned, in the same manner as any other action on a promissory note. Either party has the right to a jury, and the judgment is a personal judgment against the defendant, substantially the same as any other personal judgment. The judgment is much like a judgment in an ordinary attachment case. The judgment is for the amount due on the note, with an order that the mortgaged property be first sold to satisfy the judgment, and that if it does not satisfy the judgment, then that a general execution be issued against the property of the defendant. Where more than one note is given, there are as many causes of action as there are notes; and if any of the notes are assigned, then each owner of a note has a separate cause of action, and each has a right to have the mortgaged property sold to satisfy his claim. The mortgage is a security for each note. It is substantially the same as several mortgages for the several notes. The mortgage liens in favor of all the notes may be equal, or the lien in favor of one note may
189 be prior to that in favor of another note. In the present case, when Albinson assigned one of said notes to the Moline Plow Company, the company became the owner thereof, with the right to a separate action thereon. Each plaintiff then had a separate action, and a separate right to have the mortgaged property sold to satisfy his or its own note. Although the two notes were secured by one mortgage, yet the rights of the parties were the same as though the two notes had been secured by two different mortgages on the same piece of land. The notes are the principal thing, and the mortgage is ancillary. And as the notes are separate, the mortgage must be considered as a separate mortgage for each note. In the present case, Albinson wanted a judgment in his favor for the amount due on his note, and the mortgaged property sold to satisfy his judgment. The Moline Plow Company wanted a judgment in its favor for the amount due on its note and the mortgaged property sold to satisfy its judgment. Now where is there any community of interest in this? It is true, both want the property sold, but each wants it sold for a different purpose. What interest has Albinson in having the property sold to satisfy the Moline Plow Company's claim? And what interest has the Moline Plow Company in having the property sold to satisfy Albinson's claim? Each really wants the property

sold to satisfy his or its own claim, and not to satisfy that of the other. Instead of their being a community of interest, there is really an antagonism of interest between the plaintiffs. Either might have sued on his or its own note, and made the other a defendant, so as to have the priority of their liens on the mortgage property determined, for in this there is a conflict of interest; but they cannot sue jointly as plaintiffs for they have no interest in common. As
190 to joinder and misjoinder of parties plaintiff; see Harsh *v.* Morgan, 1 Kas., 293; Winfield Town Company *v.* Maris, 11 Kas., 148, *et seq.;* Hudson *vs.* Comm'rs of Atchison, 12 Kas., 140; Newcomb *v.* Horton, 18 Wis. 566; Barnes *v.* City of Beloit, 19 Wis., 93; Howland *v.* Supervisors, 19 Wis., 247.

The judgment of the court below is reversed, and cause remanded for further proceedings.

All the justices concurring.

191 Farmers and Merchants Bank of Cawker City *v.* Bank of Glen Elder.

Chattel Mortgages—Validity after One Year—Renewal.

1. Every chattel mortgage filed as required by the provisions of the statute, relating to mortgages of personal property, is void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith after the expiration of one year after the filing thereof, unless within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage, and if said mortgage is to secure the payment of money, the amount yet due and unpaid. Such affidavit shall be attached to and filed with the instrument or copy on file to which it relates. Paragraph 3905, Gen. St. 1889.
2. Howard *v.* Bank, 44 Kan. —, 24 Pac. Rep. 983, followed.
3. A subsequent mortgagee, who becomes such before the expiration of the year from the first filing of a prior chattel mortgage, cannot take advantage of an omission to renew the chattel mortgage within the year.

(Syllabus by the Court.)

Error from District Court, Mitchell County; Clark A. Smith, Judge.

Kelly and Thorp, for plaintiff in error.

A. H. Ellis, for defendant in error.

192 HORTON, C. J.:

Replevin for a horse and a cow of the value of $70, brought originally before a justice of the peace, by the Bank of Glen Elder, against the Farmers and Merchants Bank of Cawker City. An ap-

peal was taken to the district court. In that court the plaintiff below was permitted to amend his bill of particulars twice. To the last amended bill of particulars or petition the defendant below filed a general denial. Upon the trial, at the close of the plaintiff's evidence, the defendant filed a demurrer, for the reason that it failed to prove a cause of action. The court sustained the demurrer but allowed the plaintiff to re-open the case, and introduce further evidence. When the plaintiff finally rested, the defendant for the second time demurred to the evidence, but the demurrer was overruled. The jury returned a verdict for the plaintiff. Subsequently the court entered a judgment that the plaintiff recover $75.70 as his interest in the property in controversy, and also its costs. The defendant below excepted and complains of the judgment rendered.

It is urged that the trial court erred in permitting the plaintiff below to finally amend its bill of particulars so as to charge the Farmers and Merchants Bank of Cawker City as a copartnership, composed of U. G. Paris and F. M. Owen, instead of a corporation, as originally alleged. "Discretion is largely vested in a trial court to allow amendments to pleadings and such amendments will not be grounds for error unless it is shown that there was a flagrant abuse of discretion." Stith *v.* Fullinwider, 40 Kan. 73 19 Pac. Rep. 314; Carr *v.* Catlin, 13 Kan. 393; Board *v.* Campbell, 17 Kan. 537. The district court also has power, in the furtherance of justice, to permit the amendment of a petition by striking out one name and inserting another, when it is shown that the first name was used by mistake. Bank *v.* Pappan, 6 Kan. 456; City of Atch-
193 ison *v.* Twine, 9 Kan. 350; Hanlin *v.* Baxter 20 Kan. 134; Weaver *v.* Young, 37 Kan. 70, 14 Pac. Rep. 458. The trial court, in its discretion, had the power, after sustaining the first demurrer to the evidence, to reopen the case, and permit further evidence to be introduced. Section 139, Civil Code; Cook *v.* Ottawa University, 14 Kan. 548; Railroad Company *v.* Dryden, 17 Kansas 268; It is further urged that the trial court erred in overruling the objection to the introduction of any evidence under the second amended bill of particulars or petition. It is said that there was no allegation of any demand for the property prior to the commencement of the action. The defendant upon the trial attempted to show trial in itself, and the right of possession incident thereto under a chattel mortgage dated the 8th of March, 1886, and which was attempted to be renewed the 31st day of March 1887; therefore no proof of demand and refusal was required. Raper *v.* Harrison 37 Kan. 243; 15 Pac. Rep. 219; Bogle *v.* Gordon, 39 Kan. 31, 17 Pac. Rep. 857; Machine Co. *v.* Pann, 42 Kan. 372; 22 Pac. Rep. 417. The bill of particulars or petition, however, as amended, stated that the plaintiff below claims special ownership of the property under a mortgage executed by R. H. Mattern, to the plaintiff through J. C. McNerney, the cashier of the plaintiff. The amended pleading also alleged that R. H. Mattern, at the time that he executed the chattel mortgage, was the absolute owner of the property described therein

and had the lawful authority to mortgage and incumber the same that the debt secured by the mortgage had become due and payable, and the mortgagor was in default; that the plaintiff was entitled to the immediate possession of the property; that the defendant wrongfully, unlawfully and unjustly detained the same from the plaintiff, and wholly deprived the plaintiff from all use and benefit
194 thereof. These allegations were sufficient, as against the general objection to the introduction of any evidence, to show that the detention of the property by the defendant was wrongful, and a demand and refusal might have been properly offered in evidence, if it were necessary, under Raper *v.* Harrison, *supra*, to establish a demand and refusal. If the amended pleadings were not sufficiently specific they could have been amended on motion of the defendant below.

It is finally urged that the trial court erroneously instructed the jury as follows: "That in no event can the defendant prevail in this action on account or by virtue of any rights claimed to have accrued to it under and by virtue of the chattel mortgage offered in evidence. Such chattel mortgage of defendant, not having been shown by the evidence to have been renewed. as is required by law, is of no force as to the plaintiff's mortgage, if any mortgage plaintiff had upon the property in controversy." Upon the same ground the trial court withdrew from the consideration of the jury the renewal affidavit of the chattel mortgage of the 8th of March, 1886, but filed March 10, 1886. This renewal is referred to in the record as "Exhibit H," and was filed March 31, 1887, more than a year after the filing of the mortgage of March 10, 1886. One mortgage of the plaintiff below was filed April 17 1886 and the other mortgage, called Exhibit "A" was filed May 12, 1886. Both of these mortgages were subsequent to the mortgage of defendant below of March 10, 1886. The instruction was erroneous under the authority of Howard *v.* Bank, 44 Kan. —, 24 Pac. Rep. 983. It was said in that case that "a subsequent mortgagee with notice of prior mortgage is not a subsequent mortgagee in good faith under paragraph 3905 of the General Statutes of 1889. The words 'subsequent purchasers' and 'subsequent mortgagees in good faith' in paragraph 3905, mean only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year from the filing of the mortgage." Jones
Mortg. (3d ed.) # 293, states the rule in the same way: "Pur-
195 chasers or mortgagees who became such before the expiration of the year from the first filing, cannot take advantage of an omission to refile the mortgage. Such persons or mortgagees have notice of the existing mortgage, and take title subject to it. The statute was intended to prevent imposition upon them, and not to relieve them from incumbrances valid against them when they acquired their own title. They stand in the same position the mortgagor was in when they took their title from him." See the authorities there cited, the decisions in Michigan and Ohio are contrary to this rule but the great weight of authority is as stated in the prior de-

cision of this court. Again, paragraph 3906, Gen. St. 1889, reads: "If such affidavit be made and filed before any purchase of such mortgaged property shall be made, or other mortgage deposited, or lien obtained thereon, in good faith, it shall be as valid to continue in effect, such mortgage as if the same had been made and filed within the period above provided." It was also said in the Howard case, *supra* that paragraph 3905, Gen. St. 1889, "does not include intermediate purchasers or mortgagees. This construction is based upon reason. He who purchases after the year has expired during which a mortgage remains in force has a right, in the absence of the renewal affidavit, to suppose the mortgage has been paid, even though not released on the record; but he who purchases before the year expires, takes with notice of the mortgage and the rights of the mortgagee under the same."

Therefore the plaintiff below, having taken the second chattel mortgage soon after the filing of the first mortgage, was not a subsequent mortgagee in good faith, so as to have a prior lien to
196 the first mortgage, although the first mortgage was not properly renewed within the year.

Upon the oral argument the sufficiency of the record was challenged, and the claim was made that there is nothing here for review. We must decide in favor of the sufficiency of the record. In Ryan *v.* Madden ante, 679 (recently decided) it was ruled that "where there is attached to a petition in error a case-made, in which are found what purports to be copies of the pleadings and proceedings in the cause, but which are not specifically referred to and identified by marks and numbers, and there is attached to the case made a certificate of the judge and the attesting signature and seal of the clerk, the presumption will be that the copies of the pleadings and proceedings therein are what they purport to be, and that all were included in the case made when it was served upon the defendants, settled and signed by the judge."

The judgment of the district court will be reversed, and cause remanded for a new trial.

All the justices concurring.

197 Howard *et al. v.* First Nat. Bank of Hutchison.

Chattel Mortgages—Conversion of Mortgaged Property—Subsequent Purchasers.

1. A mortgagee entitled to the possession of personal property covered by his mortgage, may maintain an action against a third party, who has converted the same, without first obtaining a judgment against the mortgagor and without making him a party to the suit.
2. A subsequent mortgagee with notice of prior mortgage is not a subsequent mortgagee in good faith under paragraph 3905 of the General Statutes of 1889.

3. The words "subsequent purchasers" and "subsequent mortgagees in good faith," in paragraph 3905, mean only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year from the filing of the mortgage.
4. The taking of a second mortgage to secure the same debt secured by a first mortgage, and upon the same property, does not operate as a satisfaction and release in law of the first mortgage.

(Syllabus by Strang, C.)

Commissioner's Decision. Error to District Court, Harvey County, L. Houl, Judge.

Ady & Nicholson and W. E. Brown for plaintiffs in error.
Whiteside and Hutchison and Vandeveer & Martin for defendant in error.

STRANG, C.:

Action for damages for the conversion of certain sheep, begun by the plaintiff below in the district court of Harvey county, February 18, 1886. Plaintiff's right to recover was based upon a
198 chattel mortgage covering the sheep, which had become absolute, and an unsuccessful demand of the defendants below for the possession of said sheep. The defendants answered: (1) General denial; and (2) possession of the sheep under other and prior mortgages; and (3) an agister's lien. To which the plaintiff replied: (1) General denial; (2) want of consideration and fraud in the mortgage under which defendants below took possession of the sheep; and (3) that the notes and mortgages of defendants below were taken with full knowledge on their part of the mortgages of plaintiff below. The case was tried by the court and a jury, on the 10th day of May, 1887, resulting in a verdict for the plaintiff, for the sum of $779.38. A motion for a new trial followed, which was overruled and judgment entered, to which ruling and judgment the defendants excepted, and file their case made in this court, asking a reversal of the judgment of the district court.

December 1, 1884, H. C. Reeder gave the defendant, plaintiff below, a mortgage on certain sheep to secure the payment of a note for $500. January 2, 1885, Reeder gave a mortgage to the Bank of Burrton on certain sheep and other property, to secure a claim of $1,622.10. January 19, 1885, said Reeder gavela mortgage to J. E. Howard on 3000 head of sheep, to secure an alleged claim of $3000. May 21, 1885, Reeder gave a mortgage to the plaintiff below, The Bank of Hutchinson, on certain sheep and other property, to secure a loan of $175.00. July 10, 1885, Reeder gave a mortgage to the First National Bank of Newton on sheep for $500, to secure a claim for $500. The mortgage to the plaintiff below, December 1, 1884, was recorded in Harvey county, December 3, 1884. The mortgage to the Bank of Burrton was recorded in Harvey county, March 28, 1885. The

mortgage for $175. to the Bank of Hutchinson was recorded in Harvey county May 21, 1885. The mortgage to the Bank of Newton was
199 filed for record July 10, 1885, in Harvey county, Kansas. On the 29th day of June, 1885, Reeder gave the plaintiff below a renewal note and mortgage, renewing the two notes for $500 and $175 with $25 added to the latter note, covering the same sheep included in the mortgage of December 1, 1884, with their increase. This mortgage was recorded in Harvey county June 30, 1885. Reeder lived in Harvey county, and the sheep were kept there. The first question discussed in the brief of the plaintiffs in error, is that the petition of the plaintiff below does not state a cause of action. They say that the petition fails to show that the indebtedness between the plaintiff below and Reeder, the mortgagor, was ever judicially ascertained, and the petition does not make Reeder a party to the suit. We have discussed this question in the case of Howard *vs.* Burns, ante, 981 (decided at this term), and cited authorities covering the question, and now hold in this case that this objection is not good, upon the strength of that case, and the authorities there cited. The second proposition of the plaintiffs that the renewal affidavit attached to the mortgage of December 1, 1884, is not sufficient, and therefore the said mortgage expired at the end of the year from its date. We do not care to discuss the sufficiency of the affidavit, as we believe with the trial judge that, under the circumstances of this case, the renewal affidavit is not a material matter. The affidavit could only be material in case there were subsequent purchasers or mortgagees in good faith. But there are no subsequent purchasers and no subsequent mortgagees in good faith—

First. Because all the mortgagees had full knowledge of the mortgages of the plaintiff below, and of the claims they secured.
200 They each knew that the claims secured by such mortgages were not paid in whole or in part. In Gregory *v.* Thomas, 20 Wend. 17, Mr. Justice Cowen says: "To say that a man takes in good faith when he acts with notice, and of course under con-cious hostility to another, who has before taken a similar title, would be a legal solecism. The object of the statute here is that of all the other registry acts,—to prevent imposition upon subsequent purchasers and mortgagees, who must many times govern themselves by appearances. When everything is actually explained to them, they have the best kind of notice, and must be holden to take subject to prior incumbrance." Second. Because the language of the statute, (paragraph 3905, Gen. St. 1889.) "every mortgage so filed shall be void as against the creditors of the person making same or against subsequent purchasers or mortgagees in good faith after the expiration of one year after the filing thereof, unless, within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit etc." does not include the intermediate purchasers or mortgagees, that is, purchasers or mortgagees who purchase, or whose mortgages were taken, intermediate

the time of filing such mortgage and the end of the year during which it remains in force, without the renewal affidavit, but means only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year, and after it became necessary to file a renewal affidavit to continue the mortgage in force. This construction is based upon reason. He who purchases after the year has expired during which a mortgage remains in force, has a right, in the absence of the renewal affidavit, to suppose the mortgage has been paid, even though not
201 released on the record. But he who purchases before the year expires, takes with notice of the mortgage and the rights of the mortgagee under the same. If, therefore, the mortgagee fails at the end of the year, and within the time prescribed by the statute, to file his renewal affidavit, the purchaser is not affected adversely by the failure to file the affidavit, though the lien of the mortgage as to him remain intact. His rights are unaffected. They remain the same as before. He has invested nothing upon the strength of the failure of the mortgagee to file his renewal affidavit. At the time he purchased, he knew of the incumbrance. This knowledge continues, and he may not be said to be a purchaser in good faith. The same reasoning applies to intermediate mortgagees; but we are not left to a decision of this question solely upon reason or principle. The great weight of authority sustains this view.

In the case of Meech *v.* Patchin 14 N. Y. 71, Denio, C. J., says:

"It was enacted by the third section of the Laws of 1833, p. 402, that mortgages thus filed should cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless they should be refiled within thirty days before the expiration of the year, with a statement showing the same to be still on foot. A person about to deal with the possessor and apparent owner of chattels, could by resorting to the proper clerk's office, ascertain whether he had mortgaged them to another party. Should he find a mortgage on file, he could not determine, without the help of the third section, whether the lien still continued, whatever length of time had elapsed since the filing; but, by means of the provision in that section, he could be certain
202 that the mortgage had ceased to be a lien, if he found it had not been renewed within one year. If his examination was made within the year, he must proceed at his peril, or take other means to ascertain whether the mortgage remained a lien. When the plaintiffs in this case took their mortgage, the defendant's mortgage was on file, and they accordingly had the notice of it which the statute contemplated. The year from the time it was filed had not elapsed, and no default or want of diligence had, therefore, happened on the part of the defendant. The defendant's mortgage was in full vigor, and the plaintiffs' was taken subject to it. The care which the plaintiffs exercised to file their mortgage, and to preserve its validity by annually refiling a copy, was a suitable precaution

against parties coming after them; but it had not, as I conceive, any effect against the defendant's prior mortgage. The priority of the respective mortgages was fixed as soon as the last one, that of the plaintiffs had been executed. If the controversy had arisen within the year from the filing of the defendant's mortgage, there could not have been any pretense but that the defendant would have had the prior title. Their respective rights having become thus fixed, the diligence or want of diligence of either, as to preserving their liens against subsequent purchasers or mortgagees by refiling their respective mortgages, was of no importance as against each other. This seems to me the necessary construction of the statute, as well from its language as upon its general policy. Its language is: 'Every mortgage filed, etc., shall cease to be valid, etc., against subsequent purchasers or mortgagees, unless it shall, within 30 days before the expiration of the year, be again filed.' 'Subsequent,' I think, means after the time when it ought to be again filed to preserve its validity."

203 In Dillingham *v.* Bolt, 37 N. Y. 198, Justice Parker says: "As against Parmlee, Everts & Co. who purchased before the expiration of the year from the first filing of the mortgage, no refiling with a statement was necessary. It was held in Meech *v.* Patchin, 14 N. Y. 71, that the omission to refile a chattel mortgage, pursuant to the third section of the act on that subject, (Laws of 1883, p. 402) does not render it invalid against purchasers or mortgagees, intermediate the original filing and the ending of the year; and that the term 'subsequent,' in the provision in that section that 'every mortgage filed in pursuance of this act shall cease to be valid as against the creditors of the person making the same or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless' etc., means subsequent to the expiration of the year, that is, after the time of refiling has elapsed." The New York statute is like our own, so far as this question is concerned. In Newman *v.* Tymeson, 12 Wis. 448, the court says: "We think this was erroneous. The section referred to provides that a chattel mortgage, after being properly filed, shall cease to be valid as against the creditors of the mortgagor, or subsequent purchasers or mortgagees in good faith, unless, within thirty days next preceeding the expiration of the year, the mortgagee shall make and annex to it an affidavit setting forth his interest etc. The clear intent of this provision was that, in case of failure to make the affidavit, the mortgage should cease to be valid as against creditors who should thereafter seize it (the property) or purchasers who should thereafter purchase." "If property, covered by a chattel mortgage properly filed, is so taken and converted within the year after the filing as to give the mortgagee a good cause of action for such taking, it is not necessary in order to preserve his right

204 to recover that the action should be commenced within the year from such filing, or that the mortgage should be renewed at the end of the year, as required by statute, to make it valid against

subsequent purchasers or mortgagees." Case *v.* Conroe, 13 Wis. 31. Judge Orton, delivering the opinion in Lowe *v.* Wing, 56 Wis. 33, 12 N. W. Rep. 892, says: "This court has followed the courts of New York in the construction of the above statute for the renewal of chattel mortgages, and has held that 'the clear intent of this provision was that, in case of failure to make the affidavit, the mortgage should cease to be valid as against creditors who should thereafter sieze it, (the property) or purchasers who should thereafter purchase it.'" The statute of Wisconsin is the same as ours, except that the limit is two years instead of one. In Edson *v.* Newell, 14 Minn. 228 (Gil. 167) the court says: "In this case more than one year elapsed between the filing of this mortgage and the commencement of this action, and, no copy and statement having been filed as provided for in the statute quoted, the counsel for the defendant insists that the plaintiff cannot recover because the mortgage was not, as against the attaching creditors, in life at the time of the commencement of this action; in other words, because the plaintiff had ceased to have any rights under the mortgage, as against such attaching creditors. But in our opinion this position cannot be sustained. The goods were taken and sold by the defendant before the expiration of one year from the filing of the mortgage, whether since the conversion he has kept his mortgage on foot, by complying with the statute, is unimportant." Again, referring to Corbin *v.* Kincaid, 33 Kan. 552, 7 Pac. Rep. 145, Judge Valentine says:

205 "And all this transpired within less than one year after the execution of the plaintiff's mortgage, and at a time when no one would claim or even pretend that any renewal affidavit was necessary. A cause of action in replevin or conversion then arose in favor of the plaintiff and against the defendant, and that cause of action was not satisfied, annulled, or barred by any failure on the part of the plaintiff to afterwards file a renewal affidavit." Finally the Missouri court has construed our statute, and Judge Hough, in Frank *v.* Playter, 73 Mo. 672, says: "The law of Kansas, in regard to mortgages of personal property, provides that every such mortgage 'shall be void as against creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless within thirty days next preceeding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit.'" etc. The object of the statute requiring this affidavit to be made, was to keep the public informed from time to time as to the condition of the title of incumbered personal property, and to furnish some reliable record evidence by which parties might be guided in dealing with such property. This statute, by its terms, can only be invoked by subsequent purchasers or mortgagees in good faith, that is, by those who become such after the period at which such affidavit should have been made; and creditors of the mortgagor manifestly cannot claim the benefit of its provisions when their claims are asserted before the expiration of

the time prescribed. The plaintiff, however, is neither a subsequent purchaser or mortgagee, nor is he a creditor. It is true he claims through those who were creditors of the mortgagor, but those creditors had asserted their claims, and he had purchased from
206 those claiming under the proceedings instituted by them, while the mortgage was undoubtedly valid, and before any affidavit was required to be filed. The plaintiff having acquired his rights, and brought his suit, while the mortgage was a valid and subsisting incumbrance, against him and those under whom he claimed, his right to recover cannot be aided by the subsequent failure of the defendants to make the affidavit required by law. The rights of the parties had become fixed before the default occurred. Besides, the property had been reduced to possession by the defendants within the year, and that of itself dispensed with the necessity of any affidavit. This view is supported by decisions in New York and Minnesota, where similar statutes are in force. Meech *v.* Patchin, 14 N. Y. 71; Dillingham *v.* Bolt, 37 N. Y. 198; Ely *v.* Carnley 19 N. Y. 196; Porter *v.* Parmley, 52 N. Y. 185; Edson *v.* Newell, 14 Minn. 228 (Gil. 167).

It will be remembered that the first mortgage of the plaintiff below was made December 1, 1884; that all the other mortgages were made during the first half of 1885, and the sheep were taken possession of by Howard, and the Bank of Burrton in the fall of 1885, and within a year from the execution and filing of the first mortgage of the plaintiff below. The right of action for the conversion of the sheep in favor of the plaintiff below, and against the defendant below, accrued during the year from the filing of the mortgage of December 1, 1884. It follows then that, under the law of Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. Rep. 145, the right of action could not be disturbed by a failure to file the renewal affidavit. The plaintiff claims that the mortgage given by Reeder to the Hutchinson bank, December 1, 1884, was satisfied by the mortgage given June 29, 1885, the latter mortgage being given to secure
207 the same debt, and complains of instruction No. 11, given by the court. We think instruction No. 11 is correct, and taken with the thirteenth instruction, gives all the law on the subject. We do not think the taking of a second mortgage to secure the same debt, secured by a first mortgage, upon a renewal of the note, secured by the first mortgage, and upon the same property, operates as a satisfaction and release in law of the first mortgage. "The taking of a new note and mortgage on personal property to secure an indebtedness already evidenced by a note, and secured by a mortgage on the same property, does not, even when the first note and mortgage are cancelled, operate to discharge the lien of such first mortgage." Packard *v.* Kingman, 11 Iowa, 219. "Nothing but payment in fact of the debt, or the release of the mortgage, will discharge a mortgage." Crosby *v.* Chase, 17 Me. 369; Hadlock *v.* Bulfinch, 31 Me. 246. In Gregory *v.* Thomas, 20 Wend. 19, the court says: "But it is said that the defendant's second mortgage extinguished

the first; and consequently, being put to stand exclusively on the last, which was in 1835, the plaintiff's mortgage of the previous September is let in. The argument is against all the books, ancient and modern. Adjudications of several centuries upon such cases, of every variety of form, in England, in this State, and in neighboring States, settle the proposition that a subsequent security for a debt of equal degree with a former, for the same debt, will not, by operation of law, extinguish it." The plaintiff seems to think the defendant lost his rights by not proceeding upon his mortgage when the debt it secured became due. We do not think so. There is no limit to the life time of the mortgage, except such as is put upon it by the statute; otherwise, it will remain until the debt is paid or barred. Morse *v.* Clayton, 13 Smedes & M. 381. We are
208 satisfied no reversible error exists in the record in this case, and therefore recommend that the judgment of the district court be affirmed.

Per Curiam: It is so ordered; all the justices concurring.

209 TERRITORY OF OKLAHOMA, } *ss:*
County of Logan, }

I, Thomas A. Higgins, do hereby certify that I am the official court reporter of the first judicial district court of Oklahoma Territory, of which Woodward county was, at the time of the trial of the above cause, a part; that as such I took a shorthand report of the proceedings in said cause, and that the above and foregoing is a true, full and complete transcript of my shorthand notes taken on the trial thereof, and of the documentary evidence introduced thereon, and especially the opinions introduced in evidence by the defendant, and all other evidence introduced on the trial thereof.

Witness my hand this 25th day of August, 1902.

THOMAS A. HIGGINS,
Court Reporter.

Which said stipulation is indorsed on the back as follows: No. 260. National Live Stock Bank of Chicago, Illinois, *vs.* First National Bank of Geneseo, Illinois. Stipulation. Filed April 18, 1904. —— Kelly, clerk. W. H. O'Brian, deputy.

210 Be it remembered that on the 18th day of April, A. D. 1904, said court being in regular session at the April term, 1904 thereof, at the court house in the city of Woodward in said county, pursuant to an order of the supreme court of said Territory, said day being a regular judicial day of said term, present the Honorable J. L. Pancoast, judge of said court, presiding, E. P. Kelly, clerk of said court, and W. S. Stump, sheriff of said county. The following proceedings were had in said cause in said court and filed, a complete copy of which is in words and figures following to wit:

211 In the District Court of Woodward County, Oklahoma Territory.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant.

Journal Entry.

Now on this 18th day of April, A. D., 1904, it being one of the regular days of the April term, 1904, of the above court, this cause came on for trial before the court without the intervention of a jury, trial by jury having been by agreement of all parties, both plaintiff and defendant, expressly waived. The plaintiff appearing by Winston, Payne & Strawn, and Stanley, Vermilion and Evans, its attorneys, and the defendant appearing by Botsford, Deatherage and Young and Houston and Marum, its attorneys. And thereupon this cause was submitted to the court upon the pleadings, proofs, exhibits and stipulations on file herein, and the court being duly advised in the premises and having heard the argument of counsel for both plaintiff and defendant, finds the issues for the defendant, The First National Bank of Geneseo, Illinois, and against the plaintiff, The National Live Stock Bank of Chicago. And the court finds that under and by virtue of the chattel mortgage mentioned and described in the amended answer of the defendant on file herein, the defendant was at the commencement of this action entitled to the possession of the personal property therein mentioned and described and that the right to and claim of possession of said personal property of the defendant, under and by virtue of said chattel mortgage was at the commencement of this action, prior and superior to the right and claim of and to the possession thereof by the plaintiff,

212 The National Live Stock Bank of Chicago, under and by virtue of its chattel mortgage mentioned and described in its petition and amended petition on file herein. And the court further finds that under and by virtue of the order of delivery issued in this action, the sheriff took from the possession of the defendant three hundred seventy-four (374) head of cattle mentioned and described in the defendant's amended answer and in defendant's said mortgage, and that there were in existence at the time of the commencement of this action one hundred and twenty-six (126) head of cattle which were in defendant's possession and were covered by defendant's mortgage in addition to those so taken possession of by the sheriff as aforesaid, and that plaintiff also took from defendant said 126 cattle. And the court further finds that by virtue of the agreement of the parties heretofore made in this action, the right to the possession of the said one hundred and twenty-six head of said cattle, as well as the right to the possession of the three hundred

and seventy-four head so taken by the sheriff, as aforesaid, was to be tried and determined by this action. And the court further finds that at the commencement of this action and that at the time when the sheriff took possession of said cattle as aforesaid, the said five hundred (500) cattle were of the fair and reasonable market value of twenty-four ($24.00) dollars per head. To all of which findings of the court the plaintiff at the time duly objected and excepted, and still objects and excepts.

It is therefore by the court considered, ordered and adjudged by the court that at the commencement of this action the defendant was entitled to the possession of the said five hundred (500) head of cattle mentioned and described in its amended answer, and that the said defendant have and recover judgment against the
213 said plaintiff for the return of said personal property, or in the event said personal property cannot be returned, for the fair and reasonable market value of said property to wit: twelve thousand ($12,000.00) dollars, with interest at the rate of seven per cent. (7%) from the 28th day of May A. D. 1901.

The court further finds that said five hundred head of cattle have been sold by plaintiff and cannot be returned to defendant, and that defendant is entitled to judgment against plaintiff for said sum of twelve thousand dollars and interest, as aforesaid, to this day:—

Wherefore, it is considered, ordered and adjudged by the court that defendant The First National Bank of Geneseo, Illinois, have judgment for and recover from the plaintiff, The National Live Stock Bank of Chicago, Illinois, the sum of fourteen thousand four hundred and seventeen and 33/100 ($14,417.33) dollars, the principal and interest aforesaid with the costs of this action, and that execution issue therefor. This judgment bears interest at the rate of seven per cent. (7%) per annum.

And it is further ordered that the plaintiff pay the costs of this action taxed at $163.35 *dollars* to which action of the court in rendering said judgments, the plaintiff at the time duly objected and excepted, and still objects and excepts.

And thereafter and on to wit: the 18th day of April, A. D., 1904, within three days of the time when said cause was submitted to the court, as aforesaid, and on the same day, and at the same term of the above court, this cause comes on for further hearing upon the motion of the plaintiff to set aside the findings, decision and judgment of the court herein, and to grant the plaintiff a new trial of this action, the parties appearing as before, and said motion
214 having been duly submitted to the court and argued by counsel for both the plaintiff and defendant, and by the court fully considered, the court finds that said motion should be, and the same is hereby overruled. To which action of the court in overruling said motion for a new trial the plaintiff at the time duly objected and excepted, and still objects and excepts.

And thereupon, for good cause shown, and upon the application of the plaintiff in writing therefor, it is ordered that the time for

making and serving of case made herein, be, and the same is hereby extended, and that the plaintiff be, and it is hereby given thirty (30) days from this date in which to make and serve a case made for the supreme court of Oklahoma Territory upon the defendants herein. And it is ordered that said defendant have ten (10) days thereafter in which to suggest amendments in writing, and that said case made be thereafter settled upon five (5) days' notice in writing. And it is further ordered that execution be stayed upon the judgment hereinbefore rendered for the period of fifty (50) days from this date.

J. L. PANCOAST, Judge.

Approved:—
WINSTON, PAYNE & STRAWN,
STANLEY, VERMILION AND EVANS,
Attorneys for Plaintiff.
BOTSFORD, DEATHERAGE & YOUNG,
HOUSTON & MARUM,
Attorneys for Defendant.

215 Be it further remembered that on said 18th day of April, A. D. 1904, there was filed in the office of the clerk of said court in said cause a motion, a true, full and complete copy of which is in words and figures following, to wit:

In the District Court of Woodward County, Oklahoma Territory.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant.

Motion for a New Trial.

Comes now the plaintiff in the above entitled action and moves the court to set aside and vacate the decision heretofore rendered by the court and to grant this plaintiff a new trial therein, upon the following grounds, to wit:

1. Irregularity in the proceedings of the court and of the defendant, and abuse of discretion of the court, by which the plaintiff was prevented from having a fair trial.
2. Misconduct of the jury and of the defendant.
3. Accident and surprise which ordinary prudence could not have guarded against.
4. Excessive damages appearing to have been given under the influence of passion or prejudice.
5. Error in the assignment of the amount of recovery, the same being too large.
6. That the said decision is not sustained by sufficient evidence and is contrary to law.

7. Newly discovered evidence material for the plaintiff, which it could not, with reasonable diligence, have discovered and produced at the trial.

216 8. Errors of law occurring at the trial and excepted to by the plaintiff.

WINSTON, PAYNE & STRAWN,
STANLEY, VERMILION AND EVANS,
Attorneys for Plaintiff.

Said motion was endorsed as follows, to wit: No. 260. National Live Stock Bank of Chicago *vs.* First National Bank of Geneseo, Illinois. Motion for a new trial. Filed April 18th, 1904. E. P. Kelly, clerk. By W. H. O'Brian, deputy.

TERRITORY OF OKLAHOMA, } *ss.*
County of Woodward, }

I, Ed Kelly, clerk of the district court of said county, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof, I have hereunto set my hand and seal this 18th day of April, 1904.

[SEAL.]

E. P. KELLY, Clerk,
By W. H. O'BRIAN, Deputy.

Filed June 1, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

217 In the District Court of Woodward County, Oklahoma Territory.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF GENESKO, ILLINOIS, Defendant.

To Messrs. Botsford, Deatherage and Young and Houston and Marum, attorneys for the defendant, The First National Bank of Geneseo, Illinois:

Please take notice that the above and foregoing is presented and served on and delivered to you as a full, true and perfect case made in the above entitled cause, and that the same contains all of the pleadings, motions, orders, judgments, and endorsements of the court or judge, and the objections and exceptions of the parties and the evidence offered, tendered or heard on the trial and hearing thereof, together with the rulings and decision of the court thereon, and the objections and exceptions of the parties thereto, and all of the orders

of the court or judge and journal entries relating thereto, and all of the stipulations and agreements of the parties and of their counsel, the evidence so offered being full and complete and said case made contains the full statement of all the evidence offered by the plaintiff and defendant, and contains all of the proceedings of every kind and nature whatsoever that have taken place in said cause, and also contains a full statement of everything that transpired in the trial, and said case made is a full, true and perfect case made upon all the issues and questions in said case.

Dated this 18th day of April, A. D., 1904.

WINSTON, PAYNE & STRAWN AND
STANLEY, VERMILION & EVANS,
Attorneys for Plaintiff, The National Live Stock
Bank of Chicago, Illinois.

Filed, June 1, 1904,
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

218 We have examined the above and foregoing case made and find it to be true and correct, and we therefore have no amendments to suggest. We hereby waive notice on us of the time and place when and where the same will be presented to the judge of the above court for signing and settlement, and we do hereby consent that this case made may be presented in our absence by the plaintiff to the judge of said court for settlement, and that the same may be by him signed and settled in our absence, and certified, attested and filed as a correct case-made in the above entitled action.

Dated this 18th day of April, A. D. 1904.

BOTSFORD, DEATHERAGE AND YOUNG AND
HOUSTON AND MARUM,
Attorneys for Defendant, The First National
Bank of Geneseo, Illinois.

Filed June 1, 1904,
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

Service of the above and foregoing case made upon, and acknowledged by, us this 18th day of April, A. D. 1904.

BOTSFORD, DEATHERAGE AND YOUNG AND
HOUSTON AND MARUM,
Attorneys for Defendant, The First National
Bank of Geneseo, Illinois.

Filed June 1, 1904,
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

219 I, the undersigned judge of the district court of Woodward county, Oklahoma Territory, hereby certify that the above and foregoing was presented to me as a case made in the cause above entitled at the town of Woodward, county of Woodward, Oklahoma Territory, and that there appeared R. R. Vermilion, attorney for and on behalf of the plaintiff, The National Live Stock Bank of Chicago, and it appearing to me that the attorneys for the defendant, The First National Bank of Geneseo, Illinois, have waived the issuance and service of notice of the time and place of settling, signing, serving, filing, attesting and certifying to this case made, and it further appearing that the foregoing case made was duly made and served as provided by law and the order of the court herein and the order of the undersigned judge, and that defendant has no suggestions of amendments and has consented that this case made may be settled, signed, certified, attested and filed as a correct case made and said case made having been by me duly examined and found to be correct, I do now hereby allow, settle, approve, certify and sign the same as a true and correct case made in the above entitled action, to the *direct* that it be attested, certified and filed by the clerk of the district court of Woodward county, Oklahoma Territory, and that the seal of said court be thereto affixed. And I further certify that the amount involved in this action, exceeds the sum of fourteen thousand dollars, exclusive of interest and costs.

Witness my hand at the town of Woodward, Woodward county, Oklahoma Territory, this 18th day of April, 1904.

J. L. PANCOAST,
District Judge.

Attest:
E. P. KELLY, Clerk,
By W. H. O'BRIAN, Deputy.

Filed June 1, 1904.

[SEAL.]

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, Deputy.

(Endorsement:) No. 1541. National Live Stock Bank of Chicago, Illinois, *vs.* First National Bank of Geneseo, Illinois. Filed
220 April 19, 1904. E. P. Kelly clerk, by W. H. O'Brian, deputy. Petition in error and case made. Filed June 1, 1904. Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

221 And thereafter, at the January, 1905, term of said supreme court, on the third day of January, 1905, the following proceeding was had in said cause, to wit:

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant in Error.
1541.

Ordered by the court that this cause be now taken on record and briefs.

222 And thereafter, at the January, 1905, term of said supreme court, on the eleventh day of January, 1905, the following proceeding was had in said cause, to wit:

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant in Error.
1541.

And now this cause comes on for final decision and determination by the court upon the record and briefs submitted therein.

And the court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by Burwell, J. All the justices concurring except Pancoast, J., who tried the cause below, not sitting, Burford, C. J., not participating, and Beauchamp, J., absent.

Which opinion reads in words and figures as follows:

223 In the Supreme Court of the Territory of Oklahoma, January Term, 1905.

Filed February 11, 1905.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant in Error.
No. 1541.

Error from the District Court of Woodward County—J. L. Pancoast, Trial Judge—Affirmed.

Winston, Payne & Strawn, Stanley, Vermilion & Evans and Geo. S. Green, for plaintiff in error.

Botsford, Deatherage & Young and Houston & Marum, for defendant in error.

Opinion of the court by BURWELL, J.:

This case was originally tried in the district court of Woodward county, and judgment rendered in favor of the National Live Stock Bank of Chicago. The First National Bank of Geneseo appealed, and this court reviewed the record, and promulgated an opinion, in which it made a full statement and findings of facts, and enunciated the law as applied thereto, reversed the judgment of the lower court, and remanded the case, directing a new trial—76 Pac. 130.

On the second trial in the lower court it was agreed between the parties that a jury be waived, and the case submitted on the record, as made on the first trial.

Judgment was rendered in favor of the Geneseo bank, and the Chicago bank appeals to this court. No new question is raised on this appeal. The record is the same as stated in our former opinion, and we are fully satisfied with the law as therein declared.

The judgment of the lower court is hereby affirmed at the cost of the appellant. All of the justices concurring, except Pancoast, J., who presided at the trial below, not sitting, and Burford, C. J., not participating, and Beauchamp, J., absent.

224 The opinion of said supreme court referred to in the preceding opinion of said court and reported in 76th Pacific Reporter 130, is in words and figures as follows, to-wit:

225 In the Supreme Court of the Territory of Oklahoma, January Term, 1904.

Filed Mar. 4, 1904.

THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Plaintiff in Error,
vs.
THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Defendant in Error.
} No. 1294.

Syllabus.

Replevin—Assignment of Chattel Mortgage—Not Necessary to Record Acknowledgment of Release—Assignees and Incumbrances in Good Faith—Penal Statutes.

Sec. 9 of chapter 120, vol. 2, of Webb's Annotated Statutes of Kansas, which provides that, "where any mortgage of personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagor, his assignee or personal representative, to enter satisfaction, or cause satisfaction thereof to be entered, of record, in the same manner as near as may be, and under the same penalty for a neglect or refusal, as provided in the case of the satisfaction of mortgages of real estate," does not authorize or require one who purchases a negotiable promissory note, which is duly transferred by an assignment on the back thereof, before maturity, to also take a formal assignment of a chattel mortgage given to secure it, and have it filed in the office of the register of deeds. The transfer of such note carries with it the assignment of the mortgage, there being no law authorizing an assignment of a chattel mortgage, given to secure negotiable paper, to be placed of record; and such assignee, although he has no record title, will be protected against subsequent purchasers and incumbrancers in good faith, and may recover against them in a replevin action involving the property included in his mortgage.

A separate instrument executed by a mortgagee acknowledging satisfaction of a chattel mortgage and payment of the debt secured thereby, but which is not acknowledged before some officer named in the statute and certified to as provided therein, is not entitled to record, and the filing or recording thereof imports no notice.

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Duties imposed by implication are only those which are necessarily connected with the subject to which the statute relates, and, if they are penal, they are to be construed strictly, which means that they are not to be so extended by implication be-

yond the legitimate import of the words used in them as to embrace acts not clearly described by such words.

The mere fact that a mortgage in Kansas, in the absence of a contract to the contrary, owns the legal title to the property mortgaged, does not require an assignment of such mortgage to be placed of record, there being no statute imposing such duty.

Error from the District Court of Woodward County—John H. Burford, Trial Judge—Reversed and Remanded.

Botsford, Deatherage & Young, and Houston & Marum for appellants.

Winston, Babcock, Strawn & Shaw, and Stanley, Vermilion & Evans for appellee.

227 Opinion of the court by BURWELL, J.:

W. B. Grimes, who lived in Clark county, Kansas, on June 27, 1900, executed to Siegel-Sanders Live Stock Commission Company his negotiable promissory note for $11,111.23, due November 1st, 1900, with interest from maturity at the rate of 8 % per annum. To secure the payment of this note, at the same time, he duly executed a chattel mortgage to the payee of the note, on five hundred and twenty six cattle, and this mortgage was filed in the office of the register of deeds of Clark county on July 12, 1900. This note was then assigned by the payee to the Geneseo bank.

On October 24, 1900, and after the note just described had been assigned to the Geneseo bank, Grimes executed to Siegel-Sanders Live Stock Commission Company two other notes, one for $7,033.24 and one for $7000.00, due six months after date, and gave a chattel mortgage to the commission company on 633 head of cattle (which included the cattle described in the first mortgage) to secure these two notes, which were assigned to the Chicago Cattle Loan Company.

On November 24th, 1900, although the Siegel-Sanders Live Stock Commission Company had sold the note for $11,111.23 to the Geneseo bank, it, through its president, Frank Siegel, without any authority, filed in the office of the register of deeds a pretended release, in which payment of the note was acknowledged.

On February 25th, 1901, the Chicago Cattle Loan Company caused its agent, a Mr. True, to examine the records of Clark county as to chattel mortgages against Grimes, and upon this examination he found the record clear, except as to the mortgage held by his company, and so reported to it. On April 17, 1901, Grimes executed
228 two other notes to Siegel-Sanders L. S. Com. Co., for $7,694.77 each, due October 27, 1901, and to secure the payment of these two notes, he, at the same time, executed a chattel mortgage on 606 of the cattle in question. These two notes were then sold to the National Live Stock Bank of Chicago for $15,389.54, and it be-

lieved at the time it bought these notes that the mortgage securing them was a first lien on the cattle, and it secured this information through Mr. True, who personally examined the record. It is insisted that these notes were given as a renewal of the second set of notes taken by the Siegel-Sanders Co., but perhaps that is not material under our view of the law.

Grimes moved these cattle to Woodward county, Oklahoma, between April 25th and May 1st, 1901, without the knowledge or consent of either of the parties to this suit. They were seized by the Geneseo bank between the 19th and 20th of May, 1901, and the Chicago bank, within one year from the filing of the first mortgage in the office of the register of deeds of Clark county Kansas, commenced this suit in replevin in the district court to recover possession of the cattle, claiming under the mortgage which was executed to the Siegel-Sanders L. S. Com. Co. on April 17th, 1901; and the Geneseo bank claiming under the mortgage dated June 27th 1900, which was released by the Siegel-Sanders L. S. Com. Co. after its assignment to the Geneseo bank. There is practically no dispute as to the facts; and the trial court expressly held that both the parities to this action acted in good faith. It was agreed that the court should take into consideration all of the laws of Kansas, the same as though they had been formally introduced in evidence and copied into the record; and as each party is still insisting upon this agreement, this court will adhere to it.

A number of questions are argued in the briefs, and while we will not discuss all of them, we have considered them all, and
229 will discuss those which we think are controlling.

The note dated June 27th, 1900 was assigned to the Geneseo bank for value in the ordinary course of business long before maturity, and this assignment of the note carried the security with it, without the execution of a formal assignment of the mortgage.—Burhans *v.* Hutcheson, 25 Kans. 625; Mutual Benefit Life Insurance Company, *et al. v.* Huntington, 57 Kans. 744, 48 Pac. 19; Swift *v.* Bank of Washington, 104 Fed. 643; Daniels on Negotiable Instruments, vol. 2, sec. 655; Jones on Chattel Mortgages, sec. 503. And in the case of Carpenter *v.* Logan, 16 Wall. 271, the Supreme Court of the United States said: "All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principal of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. *The mortgage can have no separate existence.* When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration and takes the

case out of the rule applied to choses in action, where no such relation of dependence exists." It follows therefore that the Siegel-Sanders Live Stock Commission Company had no legal or moral right to release the mortgage securing the note which it had assigned to the Geneseo bank. And the execution and filing of the purported release was a fraud upon that bank. The bank never ap-
230 pointed the Siegel-Sanders Company its agent to collect this money, nor did that company have any express or implied authority to do so, or to release the chattel mortgage which secured the same.

It is true that the Siegel-Sanders Company is not a party to this suit, and that it has had no opportunity to be heard or make any explanation as to its connection with the transaction; still the court must take the record as presented, and determine the rights of the parties therefrom; and even if that company thought it had a right to release the mortgage, and intended to apply the proceeds of the second loan to the payment of the first, its belief in the premises would not change the law, nor do its acts in failing to apply the proceeds of the second loan to the payment of the first argue good intentions. But it is insisted that it is immaterial as to whether the Siegel-Sanders Company acted in good faith, or had authority for executing the release of the Geneseo mortgage; that it was the duty of the plaintiff in error when it bought its note from the Siegel-Sanders Company to also take and file an assignment of the mortgage securing it, and that, by not doing so, the Geneseo bank was guilty of negligence, and that the Chicago bank having bought on the record as it found it, has a better right than the appellant, and counsel cites a long list of cases to support this position; in fact the array is so formidable, were it to be conceded that the statutes of Kansas require the transfer of a chattel mortgage given to secure the payment of a negotiable promissory note to be evidenced by a formal assignment duly filed or recorded, we would readily admit this position, if the release filed were in form and executed as required by law; but after an examination of the laws of Kansas we are fully persuaded that they neither contemplate nor require it; and
231 it is universally admitted that the registration of an assignment of a mortgage is wholly the creature of statute, and if the statute does not require an assignee to record his assignment, he is not guilty of negligence in failing to do so.—Jones on Mortgages, (5th ed.) vol. 1, sec. 956. The formal assignment and transfer of the note is all that is necessary. The appellee, in support of its position, calls attention to section 9, of chapter 120 of Webb's Annotated Statutes of Kansas, which relate to the release of chattel mortgages, and is as follows: (Vol. 2) "When any mortgage of personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, his assignee or personal representative, to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be, and under the same penalty for a neg-

lect or refusal as provided in the case of the satisfaction of mortgages of real estate."

This section has been commented upon by the supreme court of Kansas, but, as applied to the question now under consideration, we have been unable to find any decision of that State which can be considered as an interpretation of it. In the case of Thomas *v.* Reynolds, 29 Kans. 304, Justice Brewer said that the statute in question had reference to one who had record title, and that the purpose of the statute was to clear the record title of the property, and that, where a mortgage has been assigned, no action, under the statutes, will lie against the assignee to recover the penalty without proof of an assignment of record. The penalty referred to is a penalty of $100, provided for in the chapter on real estate mortgages, to be recovered against a mortgagee or his assignee for failure to release a mortgage after the same has been paid. It reads as follows: "When any mortgage of real property shall have been satisfied, it shall be the duty of the mortgagee or his assignee, immediately on de-
232 mand of the mortgagor, to enter satisfaction, or cause satisfaction of such mortgage to be entered, of record; and any mortgagee, or assignee of such mortgage, who shall neglect or refuse to enter satisfaction of such mortgage, as is provided by this act, shall be liable to damages to such mortgagor, or his grantee or heirs, in the sum of one hundred dollars, to be recovered in a civil action before any court of competent jurisdiction."

The defendant was the assignee of a chattel mortgage, and, after payment, he refused to release it, and the court, the question being raised and urged, simply held that the statute referred to one holding record title. The court did not consider as to whether the assignee of a chattel mortgage should place his assignment of record; that question was not before the court, and the mere fact that it disposed of all of the questions raised is no indication as to how it would have held on the one question, which might be decided either way so far as any principle announced in the opinion was concerned. The court in that case was considering who was liable, under the statute, for failure to execute a release of a chattel mortgage, and not whether the statute required an assignment of such a mortgage to be filed or recorded. For the sake of argument it may even be admitted that the opinion assumes that an assignment may be placed of record; still that would not be controlling, because that question has never been decided in Kansas, nor was it in any way suggested in the record; and the court decided the case as presented, leaving questions not raised for future consideration. The other case, Parkhurst *v.* First National Bank of Clyde (Kans.), 35 Pac., 1116, follows the rule announced in the case of Thomas *v.* Reynolds, *supra*, and nowhere even refers to the question before us.

The only provision of the statutes of Kansas which counsel
233 for the Chicago bank contend authorize the filing of an assignment of a chattel mortgage is the one above quoted relating to this release, and all they contend for it is that "its

provisions clearly contemplate the making and recording of an assignment." The statute is penal in its nature.—Parkhurst *v.* First National Bank of Clyde, *supra.* And penal statutes are always strictly construed, no matter whether they relate to public crimes or forfeitures to individuals in the way of fixed damages, or damages to be *be* assessed by a jury.

It has been said that "the rule requiring penal statutes to be construed strictly, means only that they are not to be so extended, by implication, beyond the legitimate import of the words used in them, as to embrace cases or acts not clearly described by such words, and so as to bring them within the prohibition or penalty of such statutes." We know of no authority to the contrary. No act not included within the wording of the statute can be inferred. The application to the statute in question is clear. It relates to the release of the chattel mortgage, and not to the filing of the assignment of it. No words used therein expressly authorize an assignment to be filed, nor can it be said to do so by implication. And even if it be said that the statute recognizes the right or duty to have an assignment placed of record, we insist that such an assumption in a penal statute does not impose the duty or create the right. Duties imposed by implication are those which are necessarily connected with the subject to which the statute relates, and it is certainly clear that a general statute which makes it the duty of an assignee of a mortgage to release it, does not, by reason of the imposition of that duty alone, authorize him to record it.

The appellee has cited many cases, but our attention has
234 not been directed to a single one bearing on this question, where the assignment of a chattel mortgage was involved, notwithstanding it is one of the controlling points in the case, and has been so treated and admitted by both parties from the beginning of the trial below. It is safe to assume that none exist.

The statutes of Oregon (Hill's Code, sec. 3031) provide that a mortgage may be discharged upon the record thereof by the mortgagee or his personal representative or assignee acknowledging satisfaction of the mortgage before the clerk, or executing a certificate to that effect with the formalities of a deed, and presenting the same to the clerk. Then, sec. 3030 of the same statute provides that the recording of the assignment of a mortgage shall not, in itself, be notice to the mortgagor so as to invalidate a payment made by him to the mortgagee.

The supreme court of Oregon, in the case of Bomberger *v.* Geiser, 33 Pac., 609, in passing upon the question as to whether the statutes authorized the recording of an assignment, following a former decision of that court, said, that a thorough consideration of the subject, rendered necessary by the facts in that case, had satisfied it that the recording acts of that State do not extend to the assignment of mortgages, and then declared that: "the question is not what the plaintiffs might have done to apprise the defendant grantees that they were incumbrancers, but what they were legally bound to do

in order to preserve the priority of their lien against the subsequently acquired rights of the defendants in the property. As the plaintiffs were not bound, under the recording acts, to register their assignment, they were under no legal obligations to take the assignment of the mortgage in the form of a conveyance, and record it, in order to prevent a fraudulent discharge on the record, or to protect subsequent grantees or mortgagees."

The case above referred to is squarely in point, although it
235 relates to a real estate mortgage; but that is immaterial, as the section there construed contained the same provisions as the one we are called upon to interpret, except that it was stronger by reason of the other statute relating to the filing of an assignment of mortgages.

The supreme court of Indiana, in the case of Reeves, guardian, *vs.* Hayes *et al.*, 95 Ind., 521, considered the question in relation to the assignment of a real estate mortgage. The statutes of that State of 1876 contained the following provision: "Every conveyance or mortgage of land, or of any interest thereon * * * shall be recorded," etc.

"To entitle any conveyance, mortgage or instrument of writing to be recorded, it shall be acknowledged by the grantor."

"When any conveyance, mortgage or other instrument required to be recorded, is acknowledged," etc.

"The term 'grantor' as used in this act shall be construed to embrace every person by whom any estate or interest in lands is created, granted, bargained, sold, conveyed, transferred or assigned."

"All instruments of writing of and concerning lands or concerning any interest therein * * * shall be deemed a conveyance within the provisions of this act."

"The recording of the assignment of a mortgage shall not be deemed, of itself, notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them to the mortgagee or any assignee before actual notice of such assignment."

But in the face of all of these statutory provisions, one of which relates to the recording of the assignment of a mortgage, the court said that there was no law authorizing the record of the assignment of a mortgage, and that, by reason thereof, such record, if made, would not import notice to subsequent purchasers or mortgagees in good faith.

As to the correctness of this decision we express no opinion,
236 but it shows how reluctant the courts are to invade the domain of negotiable paper and impair its usefulness in commerce and banking transactions, by holding that assignments of mortgages given to secure it must be recorded when there is no positive statute requiring such record. Dealing in commercial paper is the purpose of our banking system, and there is no rule of law more thoroughly settled than that which protects a purchaser of such paper in good faith, before maturity, against equities not known to him; this is necessary to inspire faith in it as security; and we

are unwilling, unless required by positive statute, to adopt a rule which will place upon that class of negotiable instruments, secured by chattel mortgage, a restriction which will compel its retirement, except in the county where the mortgage is filed, from the channels of trade; and such would be the effect, for no person would invest his money under such circumstances, without either examining the record himself or having them examined by some responsible party. This would entail delay and expense. The courts should not, by reason of uncertain implications of statutes, destroy the market for negotiable paper, or a considerable part of it, any more quickly than they would destroy a market for the great commerce of the country. The protection of the one is as essential as the other, and this was recognized by the supreme court of Kansas in the case of Burhans *v.* Hutcheson, 25 Kans. 625; and it will not do to say that the note still remains negotiable, for while that is true in theory it is not true in fact. That alone which guaranteed its payment has virtually been withdrawn leaving the note with no power in trade. The legislature have the right to require that an assignment of a chattel mortgage be filed, but it has not done so; neither do we.

But even if the statutes authorize such a course, the Chicago bank is in no position to complain, because the release filed did not meet the requirements of the law. Section 9 of chapter 120
237 of vol. 2 of Webb's Annotated Statutes provides how a chattel mortgage must be released. It is as follows: "When any mortgage of personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, his assignee or personal representative, to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner, as near as may be, and under the same penalty for a neglect or refusal, as provided in case of the satisfaction of mortgages of real estate."

Sections 6 and 7 of chapter 119 of the same statute, states how a real estate mortgage may be discharged. Section 6 reads: "Any mortgage of real property that has been or may hereafter be recorded may be discharged by an entry on the margin of the record thereof, signed by the mortgagee or his attorney, assignee or personal representative, acknowledging the satisfaction of the mortgage in the presence of the register of deeds or his deputy, who shall subscribe the same as a witness. A mortgage may be released by a receipt indorsed thereon, signed by the mortgagee, his agent or attorney, which receipt may be entered on the margin of the record and shall have the same force and effect as the entry on the margin of the record as provided in this section."

And section 7 reads: "Any mortgage shall also be discharged upon the record thereof by the register of deeds whenever there shall be presented to him an instrument acknowledging the satisfaction of such mortgage, executed by the mortgagee, his duly authorized attorney-in-fact, assignee, or personal representative, and duly acknowledged and certified as other instruments affecting real estate."

It will be seen that the Siegel-Sanders Company attempted to release the Geneseo bank's mortgage in the manner pointed out by section 7, which provides that a release shall be duly "ac-
238 knowledged and certified as other instruments affecting real estate;" and sections 9, 10 and 12 of chapter 117 of the same statutes inform us as to how that acknowledgment shall be made. They are as follows:

"SEC. 9. All deeds and other conveyances of lands or of any estate or interest therein shall be subscribed by the party granting the same or by his lawful agent or attorney, and may be acknowledged or proved and certified in the manner herein prescribed."

"SEC. 10. All conveyances and other instruments affecting real estate, acknowledged within this State, must be acknowledged before some court having a seal, or some judge, justice or clerk thereof, or some justice of the peace, notary public, county clerk, or register of deeds, or mayor or clerk of an incorporated city."

"SEC. 12. The court or officer taking the acknowledgment must endorse upon the deed a certificate showing in substance the title of the court or officer before whom the acknowledgment is taken; that the person making the acknowledgment was personally known to the court, or to the officer taking the acknowledgment, to be the same person who executed the instrument, and that such person duly acknowledged the execution of the same."

The release filed was in the following form:

"In consideration of the payment of the debt secured thereby, we the Siegel-Sanders Live Stock Commission Company, of Kansas City, Missouri, do hereby release, cancel and finally discharge the deed of trust or mortgage No. 604, covering 526 head of cattle branded, bar on left thigh; given by W. B. Grimes, Jr., to secure the payment of eleven thousand one hundred eleven & 23/100 dollars, which said deed of trust or mortgage was dated 6-27-1900, and recorded in the office of the recorder of deeds of Clark county, State of Kansas, in Book —, at page —. Witness the sig-
239 nature of this company this 24th day of November, A. D. 1900.

SIEGEL-SANDERS LIVE STOCK COMMISSION COMPANY.
(Seal of Company.) FRANK SIEGEL, P't. [SEAL.]

It will be seen that the release was not acknowledged. There was no attempt to comply with the statute. Without the certificate of a duly authorized officer attached thereto showing that the maker thereof had acknowledged its execution, it was not entitled to record, and not being entitled to record, it was not constructive notice to anyone. And even if the Chicago bank had examined this release, it was bound to know that it was not in form and would not be binding, except as between Grimes and the Siegel-Sanders Company. As between them it was simply an acknowledgment of the payment of the debt. The Statutes of Oklahoma require that a chattel mort-

gage must be signed by the mortgagor in the presence of two witnesses, who must sign the same; and the court held in the case of Greenville National Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 359, that a chattel mortgage not signed by two witnesses was not entitled to be filed, and that the fact that the register of deeds filed it gave it no force or effect which it would not have had without such filing. Requirements imposed by statute as to the execution of an instrument are necessarily to be complied with or it will not give constructive notice even if placed of record. This view is sustained by the Kansas courts. In the case of Fisher, *et al. v.* Cowles, 21 Pac. 228, it was held that an assignment of a real estate mortgage not duly acknowledged, even when made on the back of the original mortgage, was an instrument not authorized to be recorded; and then the court said: "It (the assignment) being placed there (on the back of the mortgage) gave it no greater validity for record than if placed
240 upon another paper. The law does not intend that such a paper shall be recorded and therefore the spreading it upon the public records would not give constructive notice of its contents. As the assignment was not acknowledged as provided by section 11, it should not have been recorded and, being spread upon the public records without authority of law, it imparted no notice whatever." And this is the general rule.—Jones on Chattel Mortgages (3rd ed.) sec. 248. This point is well settled by many adjudicated cases.

It is true that the appellee on the trial of the case proved by an attorney from Kansas that under the law of that State a release of a chattel mortgage, when made on a separate instrument, did not have to be acknowledged; but this testimony was a mere conclusion, and is not controlling as to that question. It was agreed between the parties that, in order to avoid the "expense of taking evidence to prove the laws of Kansas" relative to this case, each party might use the statutes and decisions of that State. This agreement authorized the court to consider the statutes and decisions of Kansas, and both parties have so treated it in their briefs, and, recognizing the agreement, we have interpreted these statutes and defined the rights of the parties thereunder.

One other reason urged for the necessity of filing an assignment of a chattel mortgage is that, under the mortgage laws of Kansas, the mortgagee is the owner of the legal title, and entitled to possession of the property; and that the purpose of the registration laws is to notify the world that while the property is in the possession of the mortgagor, the legal title is in some one else. This contention is only partially true. In the absence of a stipulation to the contrary, a mortgagee has the legal title, and the right to pos-
241 session. Sec. 8 of chap. 120 of Webb's Annotated Statutes provides: "In the absence of a stipulation to the contrary the mortgagee of personal property shall have the legal title thereto and the right of possession." From this statute it will be seen that it is only in the absence of express contracts that the mortgagee is the owner of the legal title or, as a matter of right, may claim pos-

session before the conditions are broken. In the mortgage under consideration, by agreement therein, the mortgagee at least waived the right of possession. But we submit that, under the laws of Kansas, a chattel mortgage is merely a security, and the only way the rights of the mortgagor can be cut off is by foreclosure. The equities of the mortgagor are not cut off by default. Conceding, however, that the mortgagee had the legal title, the statute as to recording had been fully complied with, and nothing further was required.

The books are full of cases holding that the assignment of a deed of trust or a real estate mortgage must be recorded or the assignee will not be protected against subsequent purchasers and incumbrancers in good faith, but in every one of these cases, so far as we have been able to investigate, the courts held that the statutes on the subject of recording were sufficiently comprehensive to include such instruments.

The Geneseo bank did all that the law required it to do, and acted in good faith; while the Chicago bank accepted a second mortgage on the cattle at the time when the Geneseo bank's mortgage in law, was unreleased, and it was chargeable with the condition of the record at the time it bought its notes.

For the reasons herein stated, we think that, not only the equities (the Geneseo bank being first in time, conceding that both
242 acted in good faith) but the law is with the appellant, and that the judgment should be reversed and remanded at the cost of the appellee. It is so ordered; all of the justices concurring, except Burford, C. J., who presided at the trial below, not sitting.

243 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the opinion in the cause of The First National Bank of Geneseo, Illinois, plaintiff in error, *vs.* The National Live Stock Bank of Chicago, Illinois, defendant in error, No. 1294, which opinion was rendered by said supreme court at the January, 1904, term, on the 4th day of March, 1904.

In witness whereof, I hereto set my hand and affix the seal of said supreme court, at Guthrie, this 12 day of May, 1905.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk Supreme Court, Oklahoma.

244 Be it remembered: that on the sixth day of May, 1905, there was filed in said court a petition for a writ of error and assignment of errors in words and figures following, to-wit:

245 In the Supreme Court of the Territory of Oklahoma.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, Illinois, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant in Error.

Petition for Writ of Error with Assignments of Error at Law.

Comes now the plaintiff in error, The National Live Stock Bank of Chicago, Illinois, and says:

That on the 11th day of February, 1905, this court entered judgment herein in favor of the defendant in error and against this plaintiff in error affirming the judgment and decision of the lower court in favor of the said defendant in error and against this plaintiff in error, in which said judgments, orders, decrees and proceedings had therein and in relation thereto and the judgment of the court below so affirmed by the judgment and decree of this court in this cause, certain errors were committed to the prejudice of this plaintiff in error all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in its behalf to the supreme court of said Territory for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States.

The plaintiff in error further in its behalf shows that the amount in controversy in this cause exclusive of interest and costs exceeds the sum or amount of five thousand dollars ($5000.00) and is of about the sum and amount of fourteen thousand dollars
246 ($14,000.00), as more fully appears by the transcript of the record of said cause.

WINSTON, PAYNE & STRAWN,
STANLEY, VERMILION & EVANS,
Attorneys for Plaintiff in Error.

TERRITORY OF OKLAHOMA, County of Logan, } *ss:*

Earle W. Evans being first duly sworn according to law on his oath says: I am one of the attorneys for the plaintiff in error; that I am familiar with the controversy involved in this cause and know the amount at issue therein and involved therein and of controversy therein, and know the amount of controversy of said cause exclusive of interest and costs to exceed the sum of five thousand dollars ($5,000) and to be of about the sum of fourteen thousand dollars ($14,000.00), as more fully appears by the record in this cause which is hereby referred to.

EARLE W. EVANS.

Subscribed and sworn to before me this 6th day of May, A. D., 1905.

BENJ. F. HEGLER,
[SEAL.] Clerk Supreme Court, O. T.

Said petition is endorsed: No. 1541—The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error—Petition for writ of error—Filed May 6, 1905, Benj. F. Hegler, clerk supreme court.

247 In the Supreme Court of the United States.

THE NATIONAL LIVE STOCK BANK OF Chicago, Illinois, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, Illinois, Defendant in Error.
} Assignment of Errors.

The plaintiff in error in this action in connection with its petition for writ of error and as a part thereof makes the following assignment of errors which it avers occurred upon the trial and hearing of this cause, to-wit:

First. The court erred in affirming the judgment of the court below.

Second. The court erred in refusing to reverse the judgment of the court below.

Third. The court erred in holding and deciding that "Section 9 of chapter 120 volume 2 of Webb's Annotated Statutes of Kansas which provides that: 'where any mortgage of personal property shall have been fully paid or satisfied it shall be the duty of the mortgagor, his assignee or personal representative to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be and under the same penalty for a neglect or refusal as provided in the case of the satisfaction of mortgages of real estate,' does not authorize or require one who purchases a negotiable promissory note which is duly transferred by an assignment on the back thereof before maturity to also take a formal assignment of a chattel mortgage given to secure it and have it filed in the office of the register of deeds. The transfer of such note carries with it the assignment of the mortgage there being no law authorizing an assignment of a chattel mortgage given to secure negotiable paper to be placed of record and such assignee, although he has no record title, will be protected against subsequent purchasers and incumbrancers in good faith and may recover against them in a replevin action involving the property included in his mortgage."

Fourth. The court erred in holding and deciding that "A separate instrument executed by a mortgagee acknowledging satisfaction of

a chattel mortgage and payment of the debt secured thereby
248 but which is not acknowledged before some officer named in the statute and certified to as provided therein is not entitled to record and the filing or recording thereof imports no notice."

Fifth. The court erred in holding and deciding that "Duties imposed by implication are only those which are necessarily connected with the subject to which the statute relates and if they are penal they are to be construed strictly, which means that they are not to be so extended by implication beyond the legitimate import of the words used in them as to embrace acts not clearly described by said words."

Sixth. The court erred in holding and deciding that "The mere fact that a mortgagee in Kansas in the absence of a contract to the contrary owns the legal title to the property mortgaged does not require an assignment of such mortgage to be placed of record there being no statute imposing such duty."

Seventh. The court erred in holding and deciding that the defendant in error was not required to take a formal assignment of the chattel mortgage under which it claimed the property in controversy and have the same filed in the office of the register of deeds.

Eighth. The court erred in holding and deciding that there was no authority in the law for the filing of an assignment of the chattel mortgage under which the defendant in error claimed the property in controversy, in the office of the register of deeds.

Ninth. The court erred in holding and deciding that the defendant in error should recover against the plaintiff in error the property in controversy although it, the defendant in error, had no record title thereto.

Tenth. The court erred in holding and deciding that the release of the chattel mortgage, under which the defendant in error claimed the property in controversy, introduced in evidence, should have been acknowledged before some officer named in the statute.

Eleventh. The court erred in holding and deciding that the release of the chattel mortgage under which the defendant in error claimed introduced in evidence was not entitled to record and that the filing or recording thereof imported no notice.

Wherefore, the plaintiff in error prays that the said order and judgment herein complained of be reversed.

FREDERICK S. WINSTON,
JOHN BARTON PAYNE,
SILAS H. STRAWN,
W. E. STANLEY,
R. R. VERMILION, AND
EARLE W. EVANS,
Attorneys for Plaintiff in Error.

[Endorsed:] No. 1541. The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of

Geneseo, Illlinois, defendant in error. Assignments of error. Filed May 6 1905 Benj. F. Hegler, clerk supreme court. By ——, deputy.

249 Be it remembered: That on the 6th day of May, A. D., 1905, there was filed in said cause a writ of error and a copy of said writ of error deposited in said court in words and figures following, to wit:

250 THE UNITED STATES OF AMERICA, Territory of Oklahoma, } ss:

The President of the United States of America to the honorable judges and clerk of the supreme court of the Territory of Oklahoma, Greeting:

Because in the record of proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of Oklahoma before you, being the highest court of law and equity of the said Territory in which a decision could be had, in the said suit between The National Live Stock Bank of Chicago, Illinois, a corporation, and The First National Bank of Geneseo, Illinois, a corporation, wherein a judgment was rendered in said cause in favor of the defendant in error and against the plaintiff in error affirming a certain judgment of the district court within and for Woodward county, Oklahoma Territory, and rendering judgment therein in favor of the said defendant in error and against the said plaintiff in error and adjudging that said plaintiff in error take nothing by its said action all at the cost of the said plaintiff in error, and wherein the value of the property and the amount in controversy between said parties in said cause exclusive of interest and costs, as shown by the affidavit of Earle W. Evans, Esquire, one of the attorneys of the plaintiff in error, exceeded and exceeds the sum of five thousand dollars ($5,000.00), and is of about the sum of fourteen thousand dollars ($14,000.00). A manifest error has happened to the great damage of said National Live Stock Bank of Chicago, Illinois, as by its complaint and assignment of errors appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same at Washington at the said Supreme Court within thirty days from the date hereof. That the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of
251 said Supreme Court, the 6th day of May, in the year of our Lord one thousand nine hundred and five, in the one hundred thirtieth year of the Independence of the United States of America.

BENJ. F. HEGLER,
[SEAL.] Clerk of the Supreme Court of
the Territory of Oklahoma.

The above writ of error is hereby allowed.

JNO. H. BURFORD,
Chief Justice of the Supreme Court
of the Territory of Oklahoma.

Said writ of error is endorsed: No. 1541—The National Live Stock Bank of Chicago Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error,—Writ of error—Filed May 6, 1905, Benj. F. Hegler, clerk supreme court.

252 Be it further remembered: That on the said 12th day of May A. D., 1905, there was also filed in said cause a citation in pursuance of said writ of error together with an acknowledgment of service thereof in words and figures following, to-wit:

253 THE UNITED STATES OF AMERICA, } *ss.*:
Territory of Oklahoma, }

To the First National Bank of Geneseo, Illinois, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America to be holden at the city of Washington on the 5th day of June, A. D., 1905, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Oklahoma wherein The National Live Stock Bank of Chicago, Illinois, is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error prayed should not be corrected and why speedy justice should not be done to the said party in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of May, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred thirtieth.

[Seal Supreme Court, Territory of Oklahoma.]

JNO. H. BURFORD,
Chief Justice of the Supreme Court
of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
Clerk of Supreme Court, Territory of Oklahoma.

We hereby accept personal service of this citation on behalf of the defendant in error, The First National Bank of Geneseo, Illinois, above named this 6″ day of May, A. D., 1905.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Defendant in Error in said Cause.

[Endorsed:] No. 1541. The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error. Citation and proof — service thereof. Filed May 12 1905 Benj. F. Hegler clerk supreme court. By —— —— deputy.

254 Be it further remembered: that on the 6th day of May, A. D., 1905, an order was made in said court in said cause in words and figures as follows, to-wit:

In the Supreme Court of the Territory of Oklahoma.

THE NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, ILLINOIS, Defendant in Error. } Order.

On this 6th day of May, A. D., 1905, came the plaintiffs in error by its attorneys and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by it praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had that may be proper in the premises.

In consideration whereof the court does allow the writ of error, and if plaintiff in error shall within twenty days give bond according to law in the sum of twenty thousand dollars ($20,000.00) the same shall operate as a supersedeas bond.

JNO. H. BURFORD,
Chief Justice of the Supreme Court
of the Territory of Oklahoma.

Attest: BENJ. F. HEGLER,
[SEAL.] Clerk Supreme Court.

Said order is endorsed: No. 1541 The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error. Order allowing writ of error. Filed May 6, 1905, Benj. F. Hegler, clerk supreme court.

255 Be it further remembered: that on the 2nd day of June, 1905, there was filed in said cause a bond for costs on the writ of error, which said bond is in words and figures following, to wit:

256 In the Supreme Court of the United States.

THE NATIONAL LIVE STOCK BANK OF Chicago, Illinois, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF GENESEO, Illinois, Defendant in Error.
} Cost Bond on Writ of Error.

Know all men by these presents, that we, The National Live Stock Bank of Chicago, Illinois, plaintiff in error, as principal, and American Surety Company, as sureties, are held and firmly bound unto the defendant in error in the full and just sum of five hundred dollars ($500.00), to be paid to the said defendant in error, The First National Bank of Geneseo, Illinois, its certain attorneys, successors or assigns to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of May, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a session of the supreme court of the Territory of Oklahoma in a suit pending in said court between The National Live Stock Bank of Chicago, Illinois, plaintiff, and the First National Bank of Geneseo, Illinois, defendant, a judgment and decision was rendered against the said The National Live Stock Bank of Chicago, Illinois, plaintiff therein and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office in the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant in error citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 5th day of June next.

Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute said writ of error to effect and answer all costs if it fail to *ame*ke the said plea good then the above obligation to be void, else to remain in full force and virtue.

In witness whereof we hereunto set our hands this 24th day of May, A. D. 1905.

257 THE NATIONAL LIVE STOCK BANK OF CHICAGO,
By S. R. FLYNN, President.

[Seal The National Live Stock Bank of Chicago.]

Attest: G. A. RYTHER, Cashier.

AMERICAN SURETY COMPANY OF NEW YORK,
By J. W. McNEAL, Res. Vice President.

[Seal American Surety Company, New York.]

Attest: JOHN J. HILDRETH, Res. Ass't Sec't'y.

The foregoing bond and surety approved by me this 31 day of May, A. D. 1905.

JNO. H. BURFORD,
Chief Justice of the Supreme Court
of the Territory of Oklahoma.

258 [Endorsed:] No. 1541 The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error Cost bond on writ o error Filed Jun- 2 1905 Benj. F. Hegler clerk supreme court, by —— ——, deputy.

259 UNITED STATES OF AMERICA, }
Territory of Oklahoma, } *ss:*

In the Supreme Court.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 258 pages, numbered from 1 to 258, inclusive, are a true and complete transcript of the record and all proceedings in said supreme court in the case of The National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* The First National Bank of Geneseo, Illinois, defendant in error, No. 1541, as the same remain upon the files and records of said supreme court.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 2d day of June, 1905.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the
Territory of Oklahoma.

Endorsed on cover: File No. 19,786. Oklahoma Territory supreme court. Term No. 284. National Live Stock Bank of Chicago, Illinois, plaintiff in error, *vs.* First National Bank of Geneseo, Illinois. Filed June 5th, 1905. File No. 19,786.

FILE COPY.

FILED
APR 2 1906
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. [redacted].33

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS,
Plaintiff in Error,
vs.
FIRST NATIONAL BANK OF GENESEO, ILLINOIS,
Defendant in Error.

Error to the Supreme Court of the Territory of Oklahoma.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

FREDERICK S. WINSTON,
JOHN BARTON PAYNE,
SILAS H. STRAWN,
RALPH M. SHAW,
Attorneys for Plaintiff in Error.

BLACKBURN ESTERLINE,
EARLE W. EVANS,
Of Counsel.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 284.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, *Plaintiff in Error,* *vs.* **FIRST NATIONAL BANK OF GENESEO, ILLINOIS,** *Defendant in Error.*	Error to the Supreme Court of the Territory of Oklahoma.

STATEMENT OF THE CASE.

This is an action in replevin commenced in the District Court of Woodward County, Oklahoma, and brought into this court on a writ of error to the Supreme Court of that Territory. There is over $14,000 involved (Rec., 151) and both parties are national banking corporations with their places of business located in the State of Illinois. A jury was waived and the cause submitted to the court, which found for the National Live Stock Bank of Chicago, plaintiff in error, and rendered judgment accordingly. On a writ of error from the Supreme Court of Oklahoma

the judgment was reversed with a full statement and a finding of facts, as follows (Rec., 141, 142):

"W. B. Grimes, who lived in Clark County, Kansas, on June 27, 1900, executed to Siegel-Sanders Live Stock Commission Company his negotiable promissory note for $11,111.23, due November 1, 1900, with interest from maturity at the rate of eight per cent. per annum. To secure the payment of this note, at the same time, he duly executed a chattel mortgage to the payee of the note, on five hundred and twenty-six cattle, and this mortgage was filed in the office of the register of deeds of Clark County on July 12, 1900. This note was then assigned by the payee to the Geneseo Bank.

On October 24, 1900, and after the note just described had been assigned to the Geneseo Bank, Grimes executed to Siegel-Sanders Live Stock Commission Company two other notes, one for $7,033.24 and one for $7,000, due six months after date, and gave a chattel mortgage to the commission company on 633 head of cattle (which included the cattle described in the first mortgage) to secure these two notes, which were assigned to the Chicago Cattle Loan Company.

On November 24, 1900, although the Siegel-Sanders Live Stock Commission Company had sold the note for $11,111.23 to the Geneseo bank, it, through its president, Frank Siegel, without any authority, filed in the office of the register of deeds a pretended release, in which payment of the note was acknowledged.

On February 25, 1901, the Chicago Cattle Loan Company caused its agent, Mr. True, to examine the records of Clark County as to the chattel mortgages against Grimes, and upon this examination he found the record clear, except as to the mortgage held by his company, and so reported to it. On April 17, 1901, Grimes executed two other notes to Siegel-Sanders L. S. Com. Co., for $7,694.77 each, due October 27, 1901, and to secure the payment of these two notes, he, at the same time, executed a chattel mortgage on 606 of the cattle in question. These two notes were then sold to the National Live Stock Bank of Chicago

for $15,389.54, and it believed at the time it bought these notes that the mortgage securing them was a first lien on the cattle and it secured this information through Mr. True, who personally examined the record. It is insisted that these notes were given as a renewal of the second set of notes taken by the Siegel-Sanders Co., but perhaps that is not material under our view of the law.

Grimes moved these cattle to Woodward County, Oklahoma, between April 25th and May 1st, 1901, without the knowledge or consent of either of the parties to this suit. They were seized by the Geneseo Bank between the 19th and 20th of May, 1901, and the Chicago bank, within one year from the filing of the first mortgage in the office of the register of deeds of Clark County, Kansas, commenced this suit in replevin in the District Court to recover possession of the cattle, claiming under the mortgage which was executed to the Siegel-Sanders L. S. Com. Co. on April 17, 1901; and the Geneseo bank claiming under the mortgage dated June 27, 1900, which was released by the Siegel-Sanders L. S. Com. Co. after its assignment to the Geneseo bank. There is practically no dispute as to the facts; and the trial court expressly held that both the parties to this action acted in good faith. It was agreed that the court should take into consideration all of the laws of Kansas, the same as though they had been formally introduced in evidence and copied into the record; and as each party is still insisting upon this agreement, this court will adhere to it."

For convenience, the plaintiff in error, National Live Stock Bank of Chicago, will hereafter be termed the Chicago Bank; the defendant in error, First National Bank of Geneseo, will hereinafter be termed the Geneseo Bank; and the Siegel-Sanders Live Stock Commission Company will hereinafter be termed the Commission Company.

The cause was remanded by the Supreme Court of Oklahoma at the cost of the appellee. (Rec., 140.)

(76 Pac. Rep., 130.) It was retried in the District Court of Woodward County, Oklahoma, on a transcript of the record of the former trial, upon a stipulation of the parties and the further stipulation that they might introduce such decisions of the Supreme Court of Kansas or of the Territory of Oklahoma as they might desire.

Upon the second trial, as upon the first, the Chicago Bank contended, under the facts as found and the stipulations of the parties, that the Geneseo Bank was negligent in not taking and recording an assignment to it of the chattel mortgage when it purchased the note, and that when the release of that mortgage was recorded by the Commission Company, in whom the title to the cattle stood of record, such release cleared the cattle of the lien, and the lien of the second mortgage in the hands of the Chicago Bank was paramount; that when one of two innocent parties must sustain loss the burden should be borne by him through whose negligence the loss was brought about. On the other hand, the Geneseo Bank contended that under the laws of Kansas it was not obliged to take and record an assignment of the mortgage, because the assignment of the note carried the mortgage with it; that the release was not executed in accordance with the laws of Kansas in that it was not acknowledged and that it could not be bound thereby in any event, because the Commission Company had no authority to execute it.

Upon April 18, 1904, the *nisi prius* court of the territory, following the directions in the opinion of the Supreme Court of the territory, found for the Geneseo Bank and, the Chicago Bank having disposed of the

cattle under the writ of replevin, rendered judgment against the Chicago Bank in favor of the Genesco Bank for $14,417.33, principal, interest and costs. (Rec., 132.) On a second writ of error from the Supreme Court of the Territory of Oklahoma the judgment was affirmed February 11, 1905 (79 Pac. Rep., 1134), the court stating it could add nothing to its former opinion, "in which it made a full statement and finding of facts and enunciated the law as applied thereto." (76 Pac. Rep., 130.) The case was then brought to this court on a writ of error under the Act of Congress providing for a review by this court of the judgments of territorial courts of last resort, with an assignment of errors. (Rec., 152.)

The statutes of the State of Kansas existing during the various transactions set forth may be found in General Statutes of Kansas for 1901, by Dassler, and are printed in this brief as an Appendix.

POINTS AND AUTHORITIES.

I.

THE FAILURE OF THE GENESEO BANK TO TAKE AND RECORD AN ASSIGNMENT OF THE CHATTEL MORTGAGE LEFT IT WITHIN THE POWER OF THE COMMISSION COMPANY TO RELEASE THE SAME OF RECORD. THE GENESEO BANK SHOULD ABIDE BY THE CONSEQUENCES OF ITS NEGLIGENCE AND SUSTAIN THE LOSS, AS IT IS THE LAW THAT WHEN ONE OF TWO INNOCENT PARTIES MUST SUFFER, THE LOSS SHOULD BE BORNE BY HIM THROUGH WHOSE NEGLIGENCE IT WAS BROUGHT ABOUT.

Statutes of Kansas by Dassler, Section 4234, par. 19; Section 4241, par. 26 (appendix).

Lewis v. *Kirk*, 28 Kan., 356.

Thomas v. *Reynolds*, 29 Kan., 217.

Parkhurst v. *First Nat. Bank of Clyde*, 35 Pac. Rep., 1116.

Williams v. *Jackson*, 107 U. S., 478.

Swasey v. *Emerson et al.*, 46 N. E., 426.

Ogle v. *Turpin*, 102 Ill., 148.

Mann v. *Jummel*, 183 Ill., 533.

Lennartz, v. *Quilty*, 191 Ill., 174.

Bowling v. *Cook et al.*, 39 Iowa, 200.

Rand, Ex'r. v. *Barrett et al.*, 24 N. W., 530.

Jenks v. *Shaw*, 68 N. W., 900.

Purdy v. *Huntington*, 42 N. Y., 339.

Van Keuren v. *Corkins*, 66 N. Y., 79.

Clark v. *Mackin*, 95 N. Y., 345.

Porter v. *Ourada*, 71 N. W., 52.

Conn. Mutual Life Ins. Co. v. *Talbot*, 113 Ind., 373 (14 N. W., 588).

Baugher v. *Woolen*, 45 N. E., 94.
Ayers v. *Hays*, 60 Ind., 455.
Morris v. *Beecher et al.*, 45 N. W., 696.
Pickford v. *Peebles et al.*, 63 N. W., 779.
Banking Co. v. *Woodruff*, 2 N. J. Eq., 117.
Ferguson v. *Glassford et al.*, 35 N. W., 820.
Jones on Mortgages, Sections 481, 820, 791.
Cobbey on Chattel Mortgages, Section 648.
Townsend v. *Little*, 109 U. S., 504.

II.

THE EXECUTION, FILING AND RECORDING OF THE RELEASE OF THE CHATTEL MORTGAGE BY THE COMMISSION COMPANY, IN WHOM THE RECORD TITLE TO THE CATTLE STOOD, WAS A NOTICE TO ALL THE WORLD THAT THE DEBT SECURED BY THE MORTGAGE HAD BEEN PAID AND THAT THE CATTLE WERE CLEARED OF THE LIEN.

Statutes of Kansas by Dassler, Section 4251, par. 36; Section 4221, par. 6; Section 4224, par. 9; Section 4249, par. 34; Section 4222, par. 7 (appendix).

Testimony of Sargeant (Rec., 107).

Opinion of Burwell, J., Supreme Court, Territory of Oklahoma (Rec., 148).

Carpenter v. *Longan*, 16 Wall., 271, citing *Pierce* v. *Faunce*, 47 Me., 513.

Drum-Flato Com'n. Co. v. *Barnard et al.*, 66 Kan., 568.

ARGUMENT.

I.

THE FAILURE OF THE GENESEO BANK TO TAKE AND RECORD AN ASSIGNMENT OF THE CHATTEL MORTGAGE LEFT IT WITHIN THE POWER OF THE COMMISSION COMPANY TO RELEASE THE SAME OF RECORD. THE GENESEO BANK SHOULD ABIDE BY THE CONSEQUENCES OF ITS NEGLIGENCE AND SUSTAIN THE LOSS, AS IT IS THE LAW THAT WHEN ONE OF TWO INNOCENT PERSONS MUST SUFFER, THE LOSS SHOULD BE BORNE BY HIM THROUGH WHOSE NEGLIGENCE THE SUFFERING WAS BROUGHT ABOUT.

Under this point the following errors assigned are here particularly specified, viz.:

First. The court erred in affirming the judgment of the court below.

Second. The court erred in refusing to reverse the judgment of the court below.

Third. The court erred in holding and deciding that "Section 9 of Chapter 120, Volume 2, of Webb's Annotated Statutes of Kansas, which provides that: 'Where any mortgage of personal property shall have been fully paid or satisfied it shall be the duty of the mortgagor, his assignee or personal representative to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be and under the same penalty for a neglect or refusal as provided in the case of the satisfaction of mortgages of real estate,' does not authorize or require one who purchases a negotiable promissory note which is duly transfered by an assignment on the back thereof be-

fore maturity to also take a formal assignment of a chattel mortgage given to secure it and have it filed in the office of the register of deeds. The transfer of such note carries with it the assignment of the mortgage there being no law authorizing an assignment of a chattel mortgage given to secure negotiable paper to be placed of record and such assignee, although he has no record title, will be protected against subsequent purchasers and incumbrancers in good faith and may recover against them in a replevin action involving the property included in his mortgage."

Fifth. The court erred in holding and deciding that "Duties imposed by implication are only those which are necessarily connected with the subject to which the statute relates and if they are penal they are to be construed strictly, which means that they are not to be so extended by implication beyond the legitimate import of the words used in them as to embrace acts not clearly described by said words.'

Sixth. The court erred in holding and deciding that "The mere fact that a mortgagee in Kansas in the absence of a contract to the contrary owns the legal title to the property mortgaged does not require an assignment of such mortgage to be placed of record there being no statute imposing such duty."

Seventh. The court erred in holding and deciding that the defendant in error was not required to make a formal assignment of the chattel mortgage under which it claimed the property in controversy and have the same filed in the office of the register of deeds.

Eighth. The court erred in holding and deciding that there was no authority in the law for the filing of

an assignment of the chattel mortgage under which the defendant in error claimed the property in controversy, in the office of the register of deeds.

Ninth. The court erred in holding and deciding that the defendant in error should recover against the plaintiff in error the property in controversy although it, the defendant in error, had no record title thereto.

The question now presented does not seem ever to have been directly presented to the Supreme Court of Kansas, though this court and the highest court of almost every other state has passed upon the question in one form or another.

While its is a proposition undoubtedly sound that as between the parties "the note and mortgage are inseparable," and that the mortgage "cannot survive for a moment the debt which the note represents," it is also a proposition equally sound that when the rights of *bona fide* holders intervene, other principles of law obtain.

As to the rights of the Commission Company and Grimes, the mortgagor, the principle is applicable that the note and mortgage are inseparable, as they are the immediate parties. That the Geneseo Bank had full knowledge that the Commission Company had no power or authority to release the chattel mortgage renders its position utterly hopeless when a *bona fide* purchaser appears.

The Chicago Bank assumed, and in contemplation of law it rightly assumed, that the Commission Company did have the power and authority to release that chattel mortgage. The Chicago Bank was not only a *bona fide* purchaser for value without notice that

the Commission Company had assigned the notes and had no power or authority to release the chattel mortgage, but it was such a purchaser charged *with notice* that the Commission Company had not assigned the notes or mortgage and did have such power and authority, as the public record so proclaimed,—the highest assurance known to the law. If the Commission Company had no power or authority to release that mortgage, that lack of power or authority was a secret so carefully guarded between it and the Geneseo Bank that it was known to no other human being; whereas, the open and notorious records of Clark County, Kansas, continuously proclaimed to the Chicago Bank and to all the world, that the Commission Company was the only party clothed with power to release that mortgage, and when it did release it on the record, the authority to do so was presumed.

Assuming that the release was fraudulent the Geneseo Bank cannot complain, for the fraud was a direct offspring of its failure to take an assignment of the mortgage as well as the notes, and to record the same.

The Supreme Court of the Territory held that the Chicago Bank was not in a position to complain, because the release was irregular. It admitted that the release was good between the parties of record as it showed the debt had been paid. That being the case, there was nothing else to be said, as the record was clear.

Examine this case in any light that you choose, the inevitable result is that the Geneseo Bank was negligent in not taking and recording an assignment of the mortgage. That bank trusted the Commission

Company, and, as was said by Mr. Justice Swayne, in *Carpenter* v. *Longan*, 16 Wall., 271:

"If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who 'puts trust and confidence in the deceiver should be a loser rather than a stranger.'"

The statute of Kansas declares expressly that mortgages on real estate shall be recorded; so also with mortgages on personal property. The statute declares that discharges of mortgages on real estate shall be recorded (Appendix, Sec. 4224); so also with mortgages on personal property (Appendix, Sec. 4251). The statute imposes a penalty upon any mortgagee or assignee of a mortgage on real estate who shall refuse to enter satisfaction of record of such mortgage, after the same shall have been paid, of $100, an attorney's fee and any consequent damages (Appendix, Sec. 4224); so also with mortgages on personal property (Appendix, Sec. 4251). The statute declares that discharges of mortgages on real estate may be entered on the margin of the record of such mortgage (Appendix, Sec. 4221); so also with mortgages on personal property (Appendix, Sec. 4251). The statute expressly provides (Sec. 4251) that "When any mortgage on personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, his assigns or personal representative to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be, and under the same penalty for a neglect or refusal, as provided in case of a satisfaction of mortgage of real estate."

Though it may not be the letter of the law of Kansas that the assignment of a chattel mortgage shall be recorded, such is the manifest spirit of that law, be-

cause it is provided that an *assignee* of a chattel mortgage must release the same as a *mortgagee* must do. How could the mortgagee, "his assignee or personal representative" enter of record the discharge of a chattel mortgage unless the law implied that the assignment of the mortgage be recorded? As Mr. Justice Brewer once said (*Thomas* v. *Reynolds*, 29 Kan., 217) his satisfaction in such a case would apparently be only "an impertinent interference."

Judge Jones in his late work on "Mortgages," on very high authority, says (Sec. 479):

"The registration laws and doctrines of priority by record generally extend to assignments of mortgages as well, either by express provision of statute or by judicial construction. Where the statutes themselves do not in terms directly apply to assignments of mortgages, the courts have generally drawn an inference of intended application."

In *Lewis* v. *Kirk*, 28 Kan., 356, Romaine executed a note to Shaver, and secured the same by a real estate mortgage. Shaver transferred the note and mortgage by endorsement of the note and delivery of the mortgage to the Farmers and Merchants Bank of Wichita. No written assignment of the mortgage was ever made and recorded. Afterwards, but before the maturity of the note, Kirk purchased the property from Romaine, paying to Romaine $300 to discharge a prior mortgage; $80.65 to Shaver for releasing the mortgage executed to him, and $96.61 to Romaine. Kirk at the time, had no knowledge that the note and mortgage which had been executed by Romaine to Shaver had been transferred to the Farmers and Merchants Bank and had no knowledge of the character of the note and mortgage, except as the same was shown by the rec-

ord of the mortgage in the recorder's office. Afterwards the bank transferred the note and mortgage to its president, Lewis, who commenced the action to recover upon the same, making Romaine and Kirk parties defendant. In passing upon the question, the court said:

"The question now arises, who shall suffer from the fraud of Shaver,—the *bona fide* holder of the note and mortgage, or the *bona fide* purchasers of the mortgaged property? The plaintiff claims that it must be the purchaser of the property; and he founds that claim exclusively upon the negotiable character of the note and mortgage. The defendant, on the other hand, claims that it is the plaintiff who must lose; and she founds her claim upon the laws regulating the sale and conveyance of real estate, the registry laws, etc., and upon the claim that, although the note is negotiable, the mortgage is not. Now, it must be admitted that a mortgage, in the abstract, is not, and never was, a negotiable instrument; and that even where it is made for the purpose of securing some debt, or instrument, or act or transaction, not negotiable, it is not, and never was, a negotiable instrument. In this state, the only negotiable instruments are bills of exchange, promissory notes and bonds, payable to order or bearer; and if payable to order and transferred, then endorsed by the payee thereof. But it is claimed by the plaintiff that, when a mortgage is executed to secure the payment of a negotiable instrument, it so far partakes of the negotiable character of such instrument as to become itself negotiable; and in support of this proposition the plaintiff cites several cases. * * * To this extent, we think the claim of the plaintiff is correct. A mortgage in this state is only a security, only an incident to the debt which it is made to secure, and, like all other securities, it follows the debt and partakes of its nature and character.

"The defendant, however, disputes this doctrine, even to the extent above suggested, and cites many au-

thorities which seem to sustain his view of the case; among which one of the ablest and most thoroughly considered is the case of *Baily* v. *Smith*, 14 Ohio St., 396, 405 *et seq.* * * *

"Under the authorities, we would also think that whenever the payee and mortgagee of a negotiable promissory note, and its attendant mortgage, transfers such note and mortgage by endorsement of the note, he cannot then discharge the mortgage of record so as to affect existing rights. This would seem to be the doctrine enunciated in the following cases: *Roberts* v. *Halstead*, 9 Pa. St., 32; *Vandercook* v. *Baker*, 48 Iowa, 199. *But none of the cases yet cited reach the present case.* The authorities so far cited go only to the extent of saying that the transfer, before due, of a negotiable instrument, secured by a mortgage, cuts off all equities existing in favor of the maker of the note and mortgage, or in favor of any person who has put the same in circulation as maker or endorser, or who has notice, constructive or actual, of the existence of the mortgage, *and no sufficient and legal notice of its discharge or satisfaction; and they do not go to the extent of saying that no person can become an innocent and bona fide purchaser of the mortgaged property so as to obtain it freed from the mortgaged debt, when the records of the county apparently show that the mortgage debt is no lien upon the property, or when they fail to show that it is such lien.*

"The plaintiff claims that the case of *Burhans* v. *Hutcheson*, 25 Kan., 625, is conclusive in his favor in the present case. We do not think so, however. In that case the discharge of the mortgage of record was not made by the mortgagee, but was made by the mortgagor himself; that is, the mortgagor seemingly attempted to release himself from his own mortgage, a mortgage which he himself had executed, and to discharge himself from his own debt. The discharge in that case was void—the same as no discharge at all. *In the present case, the contest is between a bona fide holder of the note and mortgage and a bona fide purchaser of the mortgaged property, who had no knowl-*

edge, actual or constructive, that any person except the mortgagee had any interest in the note and mortgage; and the release of the mortgage was made by the mortgagee himself. The release in this case was by the right person and was valid. The two cases are so absolutely dissimilar that the one reported in 25 Kan. can be no authority for this. * * *

"Or, if the mortgage has been recorded and then has been regularly released on the margin of the record thereof by the mortgagee, then we think that any person, if he does it in good faith, may purchase the property, in like manner, freed from all liens and equities existing in favor of the holder of the mortgage; or, in other words, and to state the proposition more succinctly, a purchaser in good faith of real estate may always rely upon the public records, subject only to the equities of persons in open, visible and exclusive possession of the property. A purchaser in good faith of real estate is never bound to take notice of secret equities, liens, interests, trusts or incumbrances which cannot be discovered from an inspection of the public records, or cannot be ascertained by inquiries from the parties in possession. He may always rely upon the public records and such inquiries as they suggest, and such inquiries as are proper of the parties in possession; and if, from all these, the title appears to be clear, he will then obtain a good title, although there may be some outstanding equity or lien in favor of some other person. * * *

"But when the mortgage is recorded, its negotiable character is then extended even to *bona fide* purchasers of the property, and it retains such character contemporaneously with the existence of the note to which it is an incident until the note is satisfied or until the mortgage is released of record by the mortgagee, or his attorney, assignee, or personal representative; and that when the mortgage is so released, it then loses its negotiable character to the extent that any third person who may then purchase the property in good faith, will obtain the full, complete and absolute title thereto, freed from all equities, liens, interests, trusts,

or incumbrances existing in favor of any holder of the note and mortgage, whether the note is satisfied or not."

In *Thomas* v. *Reynolds,* 29 Kan., 216, Mr. Justice Brewer construed the section of the Kansas statute, with reference to the release and satisfaction of chattel mortgages, as follows:

"Finally, it is insisted that the plaintiffs in error were not the mortgagees, but simply the assignees, that there is no allegation or proof that there was ever an assignment placed on record; that, therefore, a satisfaction by the defendants would *prima facie* be irrelevant, and no release of the mortgage; that apparently it would be nothing but the impertinent interference of a stranger, and that unless it is shown that some assignment is recorded,—something which vests the record title in the defendants, they canont be held responsible for a failure to enter satisfaction. And in support of this, *Low* v. *Fox,* 56 Iowa, 221, 9 N. W. Rep., 131, is cited. We think this objection is good. The statute is a penal one. The object of the statute, as we have held in response to the argument of the defendant in error, is to clear the record title of the property. But, to clear that record, the parties satisfying must have record title. If not, their release and satisfaction clears nothing. It is apparently an impertinent interference. We think before a penal statute can be enforced for the default of a party, it must appear, not merely that he has failed to act, but also that the act which he has failed to do would accomplish the purpose intended by the statute. A satisfaction of a record by a stranger to a record clears no title, gives no notice. It stands as before the attempted satisfaction—a matter resting purely upon parol testimony."

If the laws of Kansas do not imply that an assignment of a chattel mortgage shall be recorded, then the section of the statute levying a penalty of $100, an attorney's fee and any consequent damages on an *as-*

signee of a chattel mortgage for failure to release the same was, in the light of the above opinion of Mr. Justice Brewer, a mere waste of words.

In *Parkhurst* v. *First National Bank of Clyde*, 35 Pac. Rep., 1116 (Kan. 1894), Chief Justice Horton, following *Thomas* v. *Reynolds, supra*, said:

"The court instructed the jury that before the plaintiff was entitled to recover, the mortgagee must be the defendant, or the defendant must be the assignee of the chattel mortgage by an assignment filed or recorded.

This instruction follows the rule adopted in *Thomas* v. *Reynolds*, 29 Kan., 304. It was held in that case that where a mortgage has been assigned no action under the statute will lie to recover the penalty without proof of an assignment of record. The purpose of the statute being to clear the record, the defaulting party must have record title, or his satisfaction will apparently be only an impertinent interference by a stranger."

It thus appears from at least two decisions of the highest court of the State of Kansas, that the laws of that state imply that the assignment of a chattel mortgage shall be recorded and that there are instances in which the assignee who failed to record the assignment must lose because of such failure.

In *Williams* v. *Jackson*, 107 U. S., 478, by a trust deed duly recorded, land was conveyed to the trustee in fee, and they were authorized to release it to the grantor upon payment of the negotiable promissory note thereby secured. Before that note was paid or payable and after it had been negotiated to an indorsee in good faith, for full value, a deed of release, reciting that it had been paid, was made to the grantor, by the trustees and by the payee of the note and recorded;

and the grantor executed and recorded a like trust deed, to secure the payment of a new note for money loaned to him by another person, who had no actual notice that the first note had been negotiated and was unpaid, and who, before he would make the loan, required and was furnished with a conveyancer's abstract of title, showing that the three deeds were recorded and the land free from encumbrances. This court held that the legal title was in the trustee under the second trust deed and that the note secured thereby was entitled to priority of payment out of the land. Mr. Justice Gray, in delivering the opinion, said:

"The first deed of trust having been made to the trustees therein named, for the benefit of Augustus Davis, and to secure the payment of the notes from the grantors to him; and the plaintiffs, upon the transfer and endorsement to them of those notes, having taken no precaution to obtain and put on record an assignment of his rights in such form as would be notice to all the world; *the recorded deed of release executed by him, as well as by the trustees, reciting that the notes had been paid, and conveying the legal title, bound the plaintiffs, as well as himself, in favor of anyone acting upon the faith of the record, and ignorant of the real state of facts.*

If the plaintiffs wished to affect subsequent purchasers with notice of their rights, they should have obtained a new conveyance or agreement, duly acknowledged and recorded, in the form either of a deed from the original grantors or of a declaration of trust from the trustees or of an assignment from Augustus Davis of his equitable interest in the land as security for the payment of the notes. *The record not showing that any person other than Augustus Davis had any interest in the notes or in the land, as security for their payment, an innocent subsequent purchaser or incumbrancer had a right to assume that the trustees,*

in executing the release, had acted in accordance with their duty.

Williams is admitted to have had no actual knowledge that the notes secured by the first trust deed were held by the plaintiffs or that they were unpaid. * * *

Williams took every reasonable precaution that could have been expected of a prudent man,before advancing his money to Charles T. Davis for Sweet and wife. He declined to lend his money until after he had been furnished with a conveyancer's abstract of title showing that the deed of release from the trustees under the first deed of trust and from the original holder of the notes secured thereby, as well as the second deed of trust to secure the repayment of the money lent by Williams, had been recorded, and that the land was not subject to any encumbrance prior to the second deed of trust.

It was suggested in argument that as the first deed of trust showed that the notes secured thereby were negotiable and were not yet payable, and that the land was not intended to be released from this trust until all the notes were paid. Williams was negligent in not making further inquiry into the fact whether they were still unpaid, but of whom should he have made inquiry? The trustees under the first deed and the original holder of the notes secured thereby having expressly asserted, under their own hands and seals, that the notes had been paid, and Sweet and his wife having apparently concurred in the assertion by accepting the deed of release and putting it on record, he certainly was not bound to inquire of any of them as to the truth of that fact; and there was no other person to whom he could apply for information, for he did not know that the notes had ever been negotiated and he had no reason to suppose that they had not been cancelled and destroyed.

To charge Williams with constructive notice of the fact that the notes had not been paid, in the absence of any proof of knowledge, fraud, or gross or wilful negligence on his part, would be inconsistent with the

purpose of the registry laws, with the well settled principles of equity and with the convenient transaction of business."

In *Swasey* v. *Emerson et al.*, 46 N. E., 426 (Mass.), R executed three mortgages to an investment company, which assigned and delivered them to a safe deposit company, which delivered them to a trust company. None of the assignments was recorded. Subsequently the investment company, the original mortgagee, executed discharges of the mortgage to one Roett, who in the meantime had become the owner of the land. Thereupon Roett executed a new mortgage to Emerson "who took it in good faith and for value relying upon the discharge and the title as it appeared in the registry." Emerson did not demand production of the prior mortgages or the notes when he took the new mortgage from Roett. On bill filed to establish priority of the mortgages, and to declare void the discharges thereof, the same was dismissed. On affirming the order of dismissal, Mr. Justice Holmes, speaking for the Supreme Judicial Court of Massachusetts, said (p. 426):

"The main argument for the plaintiff, in a few words, is, of course, that Emerson had notice of the mortgages, and of the possibility that the notes might have been assigned by the mortgagee, as they had been in fact, in which case the right of the mortgagee to make the discharges was at an end, and, therefore, that he was bound to call for the notes before relying on the discharges, just as a mortgage debtor is before he can pay the debt to the mortgagee with safety, or as in the case of a would-be purchaser of the mortgage debt. *Biggerstaff* v. *Marston*, 161 Mass., 101, 36 N. E., 785.

The argument for Emerson is equally obvious, and, in our opinion must prevail. When the title to land

is dealt with, the intent of the registry laws is that purchasers should not be required to look beyond the registry of deeds further than is absolutely necessary. The assignment of the mortgage was a conveyance, within Pub. St., c. 120, sec. 4, which the assignees might have had recorded, and in that way have protected themselves. Not having been recorded, it is invalid as against Emerson, by the express terms of the statute. To give the loan and trust company a better claim against the land, as holders of the notes, than it got by the conveyance of the land, is to defeat the statute by indirection. It does not claim by way of trust, as when the note is transferred without assignment of the mortgages; and, if it did, to say that Emerson had notice of the trust, although not recorded, under Pub. St., c. 141, Sec. 2, really is to beg the question. He only had notice that there might be one. Every grantee of land has notice that there may be a trust outstanding, but he is not called on to inquire about it unless he has notice that there is one. See *Norman* v. *Towne*, 130 Mass., 52, 54. The principle on which we go is established by *Wolcott* v. *Winchester*, 15 Gray, 461. There the defendant's grantor bought of a mortgagee of land his interest in the mortgaged land. He owned the equity in a part of the land, and in a part he did not. It was held that his title as to the former portion was good as against a prior unrecorded assignment of the mortgage, although it followed the notes as to the residue. See, also, *Morris* v. *Bacon*, 123 Mass., 58, 59, *ad fin.*

Our opinion is supported by many decisions elsewhere. *Ladd* v. *Campbell*, 56 Vt., 529; *Williams* v. *Jackson*, 107 U. S., 478, 483, 484, 2 Sup. St., 814; *Bacon* v. *Van Schoonhoven*, 87 N. Y., 446, 451, 452; *Insurance Co.* v. *Talbot*, 113 Ind., 373, 14 N. E., 586; *Daws* v. *Craig*, 62 Iowa, 515, 17 N. W., 778; *Ferguson* v. *Glassford*, 68 Mich., 36, 47, 35 N. W., 820; *Swartz's Ex'rs* v. *Leist*, 13 Ohio St., 419; *Girardin* v. *Lampe*, 58 Wis., 267; *Henderson* v. *Pilgrim*, 22 Tex., 464.

The question is raised by the plaintiff as to the authority of the president of the Debenture Company to

execute the discharges. The president did most of the company's business in Boston, and, before executing these discharges, made many deeds on its behalf, each of which had attached to it a certificate, signed by the secretary, of what purported to be a vote of the directors authorizing the deed. A similar certificate was appended to each of these deeds. There was also what purported to be a copy of a vote giving the president a general authority to discharge mortgages. The records were out of the state, and could not be produced. The evidence of authority was ample. *Com.* v. *Reading Sav. Bank*, 137 Mass., 431, 440. See *England* v. *Dearborn*, 141 Mass., 590, 592, 6 N. E., 837."

In *Ogle* v. *Turpin*, 102 Ill., 148, it was held that where a mortgagee, after an assignment of the notes secured by his mortgage, acquires the equity of redemption, and enters a formal release of the mortgage upon the record, a party taking a mortgage from him upon the same premises, without notice of the assignment of the notes, will acquire a lien superior to that of the holder of the assigned notes.

There being no presumption of law that the payee of notes secured by a mortgage has transferred the same before purchasing the equity of redemption from the mortgagor, a person taking a mortgage from the payee will not be held chargeable with notice that the notes secured in the first mortgage have been assigned, but he may rely upon the record as showing title in his mortgagor.

An assignee of notes secured by mortgage may protect his equitable lien on the mortgaged premises, by taking and putting upon record an assignment of the mortgage, so as to give notice of his interest and thereby prevent others from being deceived by any

subsequent satisfaction entered of record by the mortgagee, and the court in its opinion used this language:

"The mortgage showed the notes were payable to Runyan, and when he released the mortgage the bank had the right to presume the notes were paid, or if not, that he had waived and released the mortgage security, and was willing to look to the responsibility of the maker, or had obtained other security. We think the mere fact that the time of payment had not arrived, was not sufficient to put the bank on inquiry, or to charge it with notice that the notes had been endorsed to appellant, and were unpaid, and to give his claim a preference the bank must have had notice in fact, or of circumstances pointing to notice.

The release or cancellation by the mortgagee is *prima facie* a satisfaction, but may be shown, as between the parties, to have been made by mistake, accident or fraud, as was said in *Flower* v. *Elwood*, 66 Ill., 444. But the question remains whether the same rule applies to innocent purchasers and encumbrancers. The ruling of this court has been, under our recording laws, that a purchaser or incumbrancer may rely on, and be protected by, a clear and regular title of record, unless affected by notice of secret adverse titles or liens. Such was the manifest object and purpose of this law, and it has ever been so enforced. The very object is, that all persons having any deed, mortgage, or other instrument in writing relating to or affecting the title to land, shall record it, or failing to do so, as against innocent subsequent purchasers or lienholders he must be precluded from asserting his claim. Runyan's release of the mortgage held against Allen was *prima facie* a satisfaction,—the bank, in the absence of notice, or what is equivalent to notice, might act."

In *Mann* v. *Jummel*, 183 Ill., 533, the court held that a deed of release by a trustee holding the legal title and empowered by the trust deed to reconvey, will protect a subsequent purchaser where the record shows the debt to be long overdue, and the only parties ap-

pearing to have an interest in the trust deed are the grantor and the trustee; that one purchasing notes payable to the maker's order and secured by a deed of trust conveying the legal title to a trustee who fails to record the assignment of the notes to him, and permits the record to show the debt to be long overdue, by not recording an extension agreement, is negligent of his rights and loses priority as against one purchasing after the recording of the trustee's release deed, executed long after the date of his deed; that one purchasing a mortgage upon the representation that it is a first lien is entitled to the benefit of everything appearing of record that will sustain his rights, whether he examined the records or not. The court said:

"It must, we think, be also conceded in this case, if appellee had examined the record or procured an abstract of it, and acted upon what it showed, he would have been fully justified in acting upon the validity of the release, as against any holder of the old indebtedness, upon the presumption of payment, arising from the fact that it was long past due. Appellant is therefore driven to the position that appellee is not entitled to the protection which the record would have afforded him, because he says: 'He relied wholly on the legal opinion of his vendor, the statement of Schintz to Jummel that the second security was a good first mortgage was not merely the statement of a legal opinion, but of a fact. Jummel's inquiry was whether it was a first mortgage, and Schintz answered it was. In other words, he answered just what, as a matter of fact, the record showed.' Suppose this conversation had not taken place at all, but Jummel had made his purchase upon the assumption that he was getting a first lien; would it have been pretended, in the face of the Recording Act, that he would not have been protected, because, forsooth, he did not examine and

rely upon the record? It is said he did not rely upon the release; but he did rely upon the mortgage he was about to buy as a first lien, and he therefore relied upon, and had a right to rely upon, everything of record which would protect him in that right.

We cannot regard these parties as equally innocent, as a matter of law. True, both acted honestly and confided in Schintz. Neither had a bad motive in anything he did or attempted to do, but Mann, by failing to record the assignment to himself, and by allowing the indebtedness due him to remain of record as being long past due, and failing to record the first extension agreement, was negligent of his own rights and must suffer the consequences."

In *Leonartz* v. *Quilty*, 191 Ill., 174, this same principle is confirmed. The court said (p. 180):

"It is to be remembered that Johanna Quilty was a purchaser whose only duty was to ascertain the condition of the title, and she was under no obligation or duty to see that the note was paid or cancelled. The recording laws are designed to afford protection to parties acting in good faith and relying upon them, and in the absence of any notice or ground of suspicion it is not the duty of a purchaser to obtain an admission of payment from the holder of a note secured by a trust deed regularly released of record. There was nothing in this case to give notice to Johanna Quilty that appellant had any lien upon the property, and she was protected by the record."

In *Bowling* v. *Cook et al.*, 39 Iowa, 200 (1874), the Supreme Court of Iowa said (p. 202):

"The doctrine is announced in the case first cited (14 Iowa, 544) and is followed in the second that an assignment of a mortgage, like other instruments affecting real estate, is invalid against subsequent purchasers without notice (and a mortgagee is a purchaser) unless it be recorded. The subsequent mortgagee would not be affected by an assignment of a prior mortgage unless charged with actual notice or

the assignment has been duly recorded. Following this doctrine, we hold that if the party executing the second mortgage appear from the record to be the one to whom the first was executed and its assignment is not shown by the record, the equities of the second mortgage are superior to the first."

In *Rand Ex'r* v. *Barrett et al.*, 24 N. W., 530 (1885), the Supreme Court of Iowa in reviewing the cases of *Bank* v. *Anderson* 14 Iowa, 544; *McClure* v. *Burris*, 16 Iowa, 591; *Cornog* v. *Fuller*, 30 Iowa, 212; *Bullen* v. *Cook*, 39 Iowa, 202, said:

"It is held in those cases that one who purchases property after satisfaction of the mortgage thereon has been entered of record by the mortgagee, takes it discharged of the claims of the assignee of the mortgage, if the assignment was not recorded at the time of the purchase and he had no actual notice of the rights of the assignee."

In *Jenks* v. *Shaw*, 68 N. W., 900 (1896), the Supreme Court of Iowa said (p. 903):

"The question in this case is whether, without notice of record, the security follows the debt as against one purchasing the mortgaged property as Mr. Hartley did; in other words, whether, as to third persons acting without notice, the assignee of a debt secured by mortgage should be required to place evidence of the transfer on the record. This question is fairly answered in *Bank* v. *Anderson*, 14 Iowa, 545. After stating that the transfer of the note carried with it the security as between the immediate parties to the transaction, it is said: '*But a pertinent inquiry is whether this is equally true as to third persons who had no notice of it, to the extent that they were bound to know that the original mortgagee ceased to have the right to cancel or discharge the mortgage.* The security passes to the assignee or holder of the notes as an incident and upon the principle that the party holding the debt has a right to that which was given

to secure it. But is the theory just or tenable which compels a third person to take notice of such transfer, and of the equitable consequences following. Now, as stated above, the mortgagee or payee may be barred by it. And so there is no hardship or injustice in requiring the mortgagor to take notice of it if he proposes to satisfy his debt, for he has a right, and the exercise of a proper diligence demands, that he should exact the production of the notes before paying the same. But by what process of reasoning can this principle, or this line of argument, be urged against a third party, who, in utter ignorance of the facts, and of facts, too, which he could not ascertain by the use of even extraordinary diligence, takes an incumbrance upon property which is apparently freed from the prior lien? We confess our inability to see its applicability or pertinency.' It is further said in that opinion: *'But, on the other hand, how easy is it for the assignee of the notes or debt thus secured to protect himself. He can, by having the mortgage assigned on the margin of the record, protect himself against all possible fraud on the part of the mortgagee, and leave the evidence of his rights in such a condition as that it must inevitably be seen by any one looking for incumbrances. Or, if not thus, he may take his assignment in the ordinary form, have it duly acknowledged and recorded, and thus given notice of his interest in the security to third persons.'* In conclusion it is said: *'A secret or clandestine assignment, whether by parol or upon the instrument itself, or by the transfer of the debt, and however honest the purpose, is liable, as against third persons, to untold abuse. They ought, therefore, to be made a matter of record. The spirit, if not the very letter, of our recording law, requires it. Such a requirement can work no possible hardship, while the contrary rule can only be attended with evil, and that continually. Parties should not be permitted to leave their rights and interests in liens and real estate in such a condition as to injure those who are deceived by appearances, without a record notice to guide them.'* This case was followed in *McClure* v. *Burris*, 16 Iowa,

591. In *Bowling* v. *Cook*, 39 Iowa, 200, the court, referring to these cases, says: 'The doctrine is announced in the case first cited, and is followed in the second, that an assignment of a mortgage, like other instruments affecting real estate, is invalid against subsequent purchasers without notice (and a mortgagee is a purchaser), unless it be recorded. The subsequent mortgagee would not be affected by an assignment of a prior mortgage, unless charged with actual notice, or the assignment has been duly recorded. Following this doctrine, we hold that, if the party executing the second mortgage appear from the record to be the one to whom the first was executed, and its assignment is not shown by the record the equities of the second mortgage are superior to the first.' It is further said: 'In the absence of the record of an assignment of the mortgage in such a case, the separation of the mortgage interest and the title afterwards acquired would not appear so as to defeat the merger, and a purchaser, having no notice of the assignment, would be warranted in presuming that it had happened, and the mortgage interest had been thus extinguished.' In *Parmenter* v. *Oakley*, 69 Iowa, 389, 28 N. W., 653, the court, after referreing to *Bowling* v. *Cook*, *supra*, and *Reel* v. *Wilson*, 64 Iowa, 13, 19 N. W., 814, says as follows: 'The doctrine of these decisions is applicable to the case at bar. The mortgage, in the absence of any transfer shown by the record, is presumed to be owned and controllled by the mortgagee, and all men may deal with the mortgage or the land, resting upon this presumption, in the absence of actual knowledge of the assignment of the mortgage. The policy of our registry laws is that the records shall disclose the true condition of lands as to title and incumbrances. These laws are for the protection of all concerned in lands, and they should and do apply to transfers of mortgages as well as to the mortgages themselves. It is no greater hardship to require the assignee of a mortgage to record the assignment than to require the mortgagee to record his mortgage. The record in both cases is equally demanded for the protection of persons having dealings with the land. *Vandercook*

v. *Baker*, 48 Iowa, 199, and other cases cited by plaintiff's counsel, are not in conflict with the views we have expressed.' See, also, *Van Gorder* v. *Hannah*, 72 Iowa, 573, 34 N. W., 332. In *Livermore* v. *Maxwell*, 87 Iowa, 706, 55 N. W., 40, it is said: 'If the assignment of the notes did not operate as an equitable assignment of the trust deed, the plaintiff would have no rights under it; but, having the equitable assignment, he must, under our recording acts, place his assignment on record to bind subsequent purchasers and mortgagees who act without notice. The plaintiff, by his failure to have his assignment recorded, induced the defendant to make the loan it did, and put it into the power of J. M. Dunn to obtain and to embezzzle the money; and, under the rule quoted above, he must bear the consequences.' In *Quincy* v. *Ginsbach* (Iowa), 60 N. W., 511, the rule of the foregoing case is followed. Appellant's counsel quote from *Bank* v. *Woodman* (Iowa), 62 N. W., 31, as follows: 'The law makes provision for the satisfaction of the record of mortgages when the debts they secure are paid, and the practice is so common that, where one is not cancelled, it naturally gives rise to the thought that it is not paid, even though the period of limitation has run.' The question in that case was whether the debt was barred, and the language quoted is not applicable to a case where the mortgagee joins in the conveyance that operates as a cancellation of the mortgage as to the mortgagee. It appears to us entirely clear, under the authorities cited, that the rule in this state is that the assignee of a debt secured by mortgage must give notice on the record of the transfer to be entitled to preference over subsequent purchasers or mortgagees, without notice of the transfer."

In *Purdy* v. *Huntington*, 42 N. Y., 339, the court of Appeals of New York said:

"It is conceded that he is to be charged with constructive notice of the existence of the mortgage, and of the continuance of its lien, by its record in the proper office. By that he was informed not only of the date of the mortgage, the amount secured thereby,

and of all its particulars, but that it was open and uncanceled of record, and therefore apparently an outstanding lien and incumbrance on the premises of which he was taking title. Having that information, he knew or was at least chargeable in law with the further notice, that it was such lien and incumbrance in the hands of any person to whom it had been legally transferred, and that the record of such transfer was not necessary to its validity, nor as a protection against a purchaser of the property mortgaged or any other person than a subsequent purchaser in good faith of the mortgage itself, or the bond or debt secured thereby, but on the contrary, that a vendee of the premises took it subject to the lien of the mortgage irrespective of the ownership thereof. That knowledge and notice made it his duty, in the exercise of proper diligence, to inquire whether Minott Mitchell, his vendor, was still the owner and holder of the mortgage, and his omission to make that inquiry deprives him of the protection of a *bona fide* purchaser. These principles are fully established by the decision of this court in *Brown* .v *Blydenburgh*, 7 N. Y., 141, 57 Am. Dec., 506; *Kellogg* v. *Smith*, 26 N. Y., 18; *Gillig* v. *Maas*, 28 id., 191, etc., and *Campbell* v. *Vedder*, 3 Keyes, 174. See, also, *Raynor* v. *Wilson*, 6 Hill, 469; *Reed* v. *Marble*, 10 Paige, 409, and *New York Life Ins. and Trust Co.* v. *Smith*, 2 Barb. Ch., 82."

In *Van Keuren* v. *Corkins*, 66 N, Y., 79, the New York Court of Appeals, said (p. 80):

"The payment of the mortgagor to the mortgagees were clearly made without any knowledge of the mortgagor that the bond and mortgage had been assigned. *The case is utterly destitute of any evidence showing that the mortgagor had notice of the assignment of the bond and mortgage, or that he had any reason to believe that the same had been transferred to another person. He most manifestly acted in good faith in making the payments; and no circumstances are proved to exist which demanded of him any greater degree of vigilance than was manifested or that created suspicion which should have put him upon inquiry. The as-*

signments were not put on record, so as to give notice to the mortgagor. But even if such had been the case the mortgagor was entitled to protection under the statute, which provides that the recording of an assignment shall not of itself be deemed notice of the same to a mortgagor, so as to invalidate any payment made. 1 R. S., 763, Sec. 41. It is a well established rule that the assignee of a bond and mortgage, if he wishes to protect himself against *bona fide* payments by the mortgagor to the mortgagee, must notify the mortgagor of the assignment. *Reel* v. *Marble*, 10 Paige, 409; *James* v. *Morey*, 2 Cow., 258, 14 Am. Dec., 475; *New York Life Ins. and T. Co.* v. *Smith*, 2 Barb. Ch., 82. The rule stated is a salutary one and protects the rights of parties affected by an assignment from fraud or imposition. It is true where actual notice is not given, if the circumstances under which the payments are made are such as to show constructive notice, the mortgagor may be chargeable with notice of the transfer."

In *Clark* v. *Mackin*, 95 N. Y., 345 (1884), M executed a mortgage to I, who assigned it to D, who assigned it to D, who assigned it to plaintiff. None of the assignments was recorded. The premises were sold and conveyed to the defendant, McNeal. I, the mortgagee, executed and delivered to the defendant, McNeal, without consideration, a satisfaction piece, which was recorded. The defendant, McNeal, thereupon executed and delivered to R and others, a mortgage of the same premises, which was recorded. Thereupon R, the mortgagee, assigned the mortgage to Mackin and others, for value and without notice of the prior unrecorded assignments. The Court of Appeals of New York, per Miller, J., said (p. 351):

"Within well settled rules the mortgage belonging to the plaintiff was not entitled to a priority over the mortgage held by Mackin and Verplanck as executors. The assignment of the mortgage held by them was

taken without any knowledge or notice of the existence of the mortgage held by the plaintiff, which had been satisfied of record, and under such circumstances the plaintiff had no right to priority. The authorities settle this question beyond any controversy, and the respondents, as *bona fide* purchasers, were clearly entitled to a preference over the plaintiff's mortgage. *Van Keuren* v. *Corkins*, 66 N. Y., 77; *Bacon* v. *Van Schoonhoven*, 87 id., 446."

In *Porter* v. *Ourada*, 71 N. W., Rep., 52 (Neb. 1897), the court said:

"In view of these established facts, what are the rights and liabilities of Porter, the trust company and Stibal? Stibal having purchased and paid for this real estate a valuable consideration, after the entry of the satisfaction of the mortgage by Toncray, the original mortgagee, without notice, actual or constructive, that the Toncray mortgage had been assigned and remained unpaid, and that the release thereof was unauthorized, he is entitled to protection as against the Toncray mortgage now sought to be foreclosed by Porter. *Whipple* v. *Fowler*, 41 Nebraska, 675; 60 N. W., 15. *The principle upon which that case rests is that where one of two innocent parties must suffer a loss, he whose negligence caused the injury should bear it. Although Porter is an innocent holder of the debt and mortgage, yet he might have protected himself by taking a formal assignment in writing from Toncray of the mortgage purchased by him and caused it to be recorded in the office of the register of deeds of Colfax County. Eggert* v. *Beyer*, 43 Neb., 711; 62 N. W., 57. *And if his neglect to do this has caused the loss, which either he or Stibal must bear, then as between those two parties the loss should fall on Porter.*" See, also, *Cram* v. *Cotrell*, 48 Neb., 646.

In *Connecticut Mutual Life Insurance Co.* v. *Talbot*, 113 Ind., 373, the court held that the assignee of a mortgage, who fails to record his assignment, will be estopped from asserting the priority of his mortgage

over that of a subsequent mortgagee who took it upon the faith of a release executed by the administratrix of the original mortgagee and entered of record. The court said:

"Whether the assignment of a mortgage was such an instrument as was entitled to be recorded prior to the act which came in force July 2, 1877, or whether prior to that act an assignment could be so made on the record as that in either case the record would operate as notice of the assignment, and to what extent innocent purchasers and subsequent mortgagees who advanced money on the faith of a release entered of record by a prior mortgagee, might rely upon such release, have heretofore been subjects of more or less extended discussion and consideration by this court. *Reeves* v. *Hayes*, 95 Ind., 521.

Whatever conclusion we might arrive at, as at present advised, in respect to whether or not assignments of mortgages were within the recording acts prior to July 2, 1877, there is no room to doubt but that such assignments are affected by the act last above named. Whether or not the questions considered in *Reeves* v. *Hayes, supra*, are longer of any general importance, it is clear that they are of no practical moment as applied to the present case.

It is assumed everywhere that, if the recording acts afford the assignee of a mortgage the opportunity of giving notice of his rights by procuring and putting of record an assignment of the mortgage, neglect on his part to do so will estop him from asserting the invalidity of a duly recorded release executed by his assignor, after an innocent purchaser has paid his money on the faith of the public records. It is settled everywhere that unrecorded assignments of mortgages are void as against subsequent purchasers whose interests may be affected thereby, and whose conveyances are duly recorded, provided such assignments are embraced by the recording acts. *Bacon* v. *Van Schoonhoven*, 87 N. Y., 446; *Decker* v. *Boice*, 82 Id., 215; *Swartz* v. *Leist*, 13 Ohio St., 419; *Yerger* v. *Barz*,

56 Iowa, 77; *Henderson* v. *Pilgrim*, 22 Tex., 464; Boone on Mortgages, Sec. 92; 1 Jones on Mortgages, Sec. 472.."

In *Baugher* v. *Woolen*, 45 N. E., 94 (Ind. 1896), the court said:

"It is still true that the assignment of a note secured by mortgage operates *pro tanto* as an assignment of the mortgage itself. But in order that the holder of a note so assigned should be protected in his lien against a good faith mortgagee or an innocent purchaser of the mortgaged premises, it is necessary that such assignment should be placed upon record, as provided by the statute. *Insurance Company* v. *Talbot*, 113 Ind., 373. The record therefore showing no assignment of the note secured by the second mortgage, the assumption must be that the note was owned by the mortgagee himself. He took in his own name, as the record shows, a mortgage to secure the note. The note might have been originally given to some one else and transferred to the mortgagee, or it might have been originally given to the mortgagee himself, and his name incorrectly copied in the description of the note. However that may be, there is nothing in the record to show that the note ever belonged to anyone but the mortgagee. There being no assignee shown it was therefore sufficient, in the words of the statute, to make the mortgagee defendant in the suit to foreclose the mortgage."

In [illegible] v. *Hays*, 60 Ind., 455, the court said:

"The case of *Lapping* v. *Duffy*, 47 Ind., 51, is cited to sustain this position. In that case Duffy executed a mortgage to McClung, to secure the payment of six promissory notes. These notes were, on the same day, sold and transferred by endorsement to the Ohio Insurance Company. This company brought suit on the last four notes and obtained judgment upon them and a foreclosure of the mortgage. After there had been one full assignment of this judgment and another assignment of a portion of it, McClung, without any express authority, entered satisfaction of the mortgage

on the proper mortgage record. It was held that this entry of satisfaction was not binding on the assignees of that judgment of foreclosure, and did not prevent them from enforcing their judgment against the mortgaged premises. *The reasons for so holding are not given at much length in the opinion in that case but they are obvious to the most casual reader of that opinion. The judgments on the notes and for the foreclosure of the mortgage, was notice to all the world that McClung had parted with his interest in those notes and with his interest in so much of the mortgage at least as was intended as a security for their payment.* All persons, therefore, who became interested in the mortgaged premises, after the entry of the judgment of foreclosure, were required to take notice that McClung had parted with his interest in the mortgage, so far as it operated as a security for the satisfaction of that judgment.

We do not regard that case as conclusive upon the one at bar. On the contrary, it seems to us that the notice resulting from the proceedings and judgment of foreclosure in that case constitutes an important element of difference between the two cases. In the case at bar there was nothing on record when Hays and Butcher purchased the mortgaged property indicating that Campbell had parted with the note in suit, or that it remained unpaid, or that Campbell was not fully authorized to enter satisfaction of the mortgage, or had made any mistake in such entry of satisfaction."

In *Morris* v. *Beecher et al.*, 45 N. W., 696 (1890), the Supreme Court of North Dakota said (p. 698):

"One who loans money on real estate, relying on a satisfaction of a mortgage thereon made by the record owner of the mortgage, which, however, had been previously assigned, the instrument not being recorded, is protected. *Bacon* v. *Van Schoonhoven*, 87 N.Y., 446. Clearly he would be protected where the satisfaction is made by one who is both on the record and in fact the owner of the mortgage satisfied. *The assignee of a second mortgage, who so relies upon such*

a satisfaction, is as much entitled to protection as one who makes a loan on the property. The only difference is that one makes a loan on a second mortgage believing it to be a first lien, and the other buys a second mortgage believing it to be a paramount incumbrance. They are both deceived by the act of the first mortgagee, and therefore they are both equally entitled to protection as against his mortgage. The authorities fully sustain the conclusion we have reached. Ferguson v. *Glassford* (Mich.), 35 N. W. Rep., 820; *Sheldon* v. *Holmes*, 58 Mich., 138, 24 N. W. Rep., 795; *Lewis* v. *Kirk*, 28 Kan., 497; *Cornog* v. *Fuller*, 30 Iowa, 212; *Girardin* v. *Lampe*, 58 Wis., 272, 16 N. W. Rep., 614; *Van Keuren* v. *Corkins*, 66 N. Y., 77; *Clark* v. *Mackin*, 95 N. Y., 347. The last case is in point, the purchaser who was protected being a purchaser of a second mortgage, who bought the mortgage as a first lien on the strength of a satisfaction of the prior mortgage. But the case at bar is stronger; for there the satisfaction was executed by the mortgagee after he had assigned the mortgage, the assignment not being recorded, while in the case at bar the owner of the mortgage executed and recorded the satisfaction himself. In *Clark* v. *Mackin* the owner of the first lien by his negligence rendered it possible for an innocent person to be deceived by another, whereas in the case at bar the owner himself made the statement which was calculatd to and did mislead the innocent purchaser, Barnes."

In *Pickford* v. *Peebles et al.*, 63 N. W., 779 (South Dakota, 1895), it was held that where T executed and delivered to D a promissory note, and also a trust deed in the name of a third party, as trustee, to secure the payment of the same, and D transferred the note for value before maturity, but executed no formal assignment of the security and T, the maker of the note, subsequently sold the property described in the trust deed, to an innocent purchaser for value, who had notice of the assignment other than that disclosed

by the county records, and T obtained from the duly authorized agents of D a release of the property executed in the name of the trustee in the trust deed, which was duly recorded, that the purchaser of the note having failed and neglected to take and record an assignment of the trust security could not enforce his lien upon the property as against such innocent purchaser. The court said:

"Although not expressly authorized by W. B. Dunn to execute the release in his name, yet the discharge by J. M. Dunn cannot be said to be a forged release, because, being authorized to discharge or release the trust deed or mortgage by the apparent beneficiary, Mrs. Dunn, the form in which it was done was not important, so far as it affected an innocent purchaser for value without notice. If J. M. Dunn had executed the release in the name of W. B. Dunn, without authority from him or from Mrs. Dunn, a different question would have been presented. But, as suggested by the learned judge in his decision, had the note not been transferred, Mrs. Dunn would have been bound by the discharge made by her agent in the manner it was made, and she could not have foreclosed the mortgage as against Peebles after the execution of the release. She would have been concluded and estopped by this deed of release. This being so, the plaintiff not having taken and recorded an assignment of the trust deed, stands in no better position than would Mrs. Dunn, had she never transferred the note, as to Peebles, an innocent purchaser for value without actual notice of the transfer of the note secured by the trust deed. The plaintiff could have protected himself against any release by Mrs. Dunn, or her agent, J. M. Dunn, by taking the precaution to take and cause to be recorded an assignment; but, failing to do so, his lien upon the property is gone in favor of an innocent purchaser. *Merrill* v. *Luce* (S. D.), 61 N. W., 43; *Merrill* v. *Hurley* (S. D.), 62 N. W., 958. His neglect to take and record an assignment cannot prejudice

the rights of an innocent purchaser. The plaintiff's equity by reason of his purchase of the Tomlinson note is no greater than that of Peebles, who purchased the property in good faith without notice of plaintiff's equity; and as the plaintiff, by his own neglect, has caused the defendant Peebles to advance his money upon the property, plaintiff cannot enforce the mortgage as against him.

The reason for such a rule is not only fully stated in the cases cited from our own court, but by the Supreme Court of the United States in *Williams* v. *Jackson*, 107 U. S., 478, 2 Sup. Ct., 814. * * * In *Livermore* v. *Maxwell* (Iowa), 55, N. W., 37, the effect of a release, though in a somewhat different form, made by P. M. and J. M. Dunn, under a similar trust deed, was considered by the court, *and the conclusion arrived at that a subsequent purchaser in good faith for value and without notice took the land discharged of the lien notwithstanding the court held the note in that case was negotiable. There was nothing appearing upon the face of the release, executed in the name of W. B. Dunn to Tomlinson, calculated to put Peebles upon inquiry, or that required him to make investigations as to the authenticity of the document or the authority of the trustee to discharge the trust deed.* Presumptions of constructive notice, as against *bona fide* purchasers for value without actual notice, are not favored by the courts. The rule governing such cases is thus stated by the Supreme Court of the United States, in *Wilson* v. *Wall*, 6 Wall., 83: 'A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors, where he says: 'In *Ware* v. *Lord Egmont*, the lord chancellor, Cranworth, expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice, unless the circumstances

are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired, it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether not obtaining was an act of gross or culpable negligence.' "

In *Banking Co.* v. *Woodruff*, 2 N. J. Eq., 117, the court said:

"It has been settled in this court that the cancellation of a mortgage on the record is only *prima facie* evidence of its discharge and leaves it open to the party making such allegation to prove that it was made by accident, mistake or fraud. On such proof being made the mortgage will be established even against subsequent mortgagees without notice." Citing *Miller* v. *Wack*, 1 Saxton, 214, and *Lilly* v. *Quick*, 2 N. J. Eq., 97."

In *Ferguson* v. *Glassford et al.*, 35 N. W., 820 (1888), the Supreme Court of Michigan, in commenting upon the language quoted in *Banking Company* v. *Woodruff, supra,* said:

"The statement as laid down is too broad. What the lower court meant by subsequent mortgagees were those who were subsequent to the mortgage which was discharged but who became mortgagees before the discharge was placed upon record. This is evident from the cases cited by the court. If they become mortgagees or purchasers after the discharge is placed upon record they are entitled to the same protection which the recording laws afford to subsequent purchasers and incumbrancers in good faith as against unrecorded conveyances who can be affected only by actual notice or notice of such facts as should have put them upon inquiry. The rule was applied by this court in *Sheldon* v. *Holmes*, 58 Mich., 138, 24 N. W. Rep., 795. In this case it is conceded that the dis-

charge of the mortgage in question was placed upon record by mistake. The mortgage then appears to be an existing lien as between the parties and those in privity with them with notice that the holder claimed it to be an existing lien."

Judge Jones in his late work on "Mortgages," on high authority, says (Sec. 481):

"The effect of recording an assignment is not only to protect the assignee against a subsequent sale of the mortgage by the apparent holder of it, *but also to prevent a wrongful discharge of it by the mortgagee.*"

Again, the same author says (Sec. 820):

"An assignment by transfer of the debt only is effectual between the parties. The mortgage passes as an incident to the note. No assignment of the mortgage is necessary as between the parties, or as against the mortgagor or others having actual notice of the transfer of the notes. The mortgagor is bound to take notice of such an assignment upon the discharge of his debt, because proper diligence on his part demands that he should require the production of the notes before paying.

But if the mortgagee, while the notes are in the hands of the assignee, cancels the mortgage on receiving payment from the mortgagor, who then makes conveyance of a new mortgage to another person, who acts in good faith and in ignorance of the fact that the original mortgagee had not been paid to the proper party, such purchaser or subsequent mortgagee has the better title. *Such subsequent purchaser or mortgagee is not bound to take notice of an assignment by transfer of the notes alone. The assignee of the notes can easily protect himself by requiring an assignment of the mortgage and recording it, and thus give notice of his rights; and if he omits to do this, he should be the party to suffer for the negligence.*"

Mr. Cobbey in his work on "Chattel Mortgages," Sec. 648, on high authority, says:

"An assignee is entitled to rely upon the record the same as any purchaser, and when that shows a good title in his assignor, he takes a good title and will be protected against secret lien and incumbrances prior to the mortgage. In other words, an assignee for value without notice stands upon the same footing as a *bona fide* purchaser."

Nor does the record show that there was constructive notice to the Chicago Bank. What is necessary to charge a person with constructive notice has been by this court well defined.

In *Townsend* v. *Little*, 109 U. S., 504, in defining constructive notice, this court, speaking through Mr. Justice Woods, said (p. 511-512):

"Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. *Plumb* v. *Fluitt*, 2 Anst., 432; *Kennedy* v. *Green* 3 My. & K., 699. Where possession is relied on as giving constructive notice it must be open and unambiguous, and not liable to be misunderstood or misconstrued. *Ely* v. *Wilcox*, 20 Wis., 523; *Patten* v. *Moore*, 32 N. H., 382; *Billington* v. *Welsh*, 5 Bin., 129. It must be sufficiently distinct and unequivocal so as to put the purchaser on his guard. *Butler* v. *Stevens*, 26 Maine, 484; *Wright* v. *Wood*, 23 Penn. State, 120; *Boyce* v. *Williams*, 48 Ill., 371. As said by Strong, J., in *Meehan* v. *Williams*, 48 Penn. State, 238, what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. See, also, *Holmes* v. *Stout*, 3 Green Ch., 492; *McMechan* v. *Griffing*, 3 Pick., 149; *Harwick* v. *Thompson*, 9 Ala., 409.

Tested by these rules, it is plain that the physical occupancy of the premises in question by appellant, as found by the District Court, was not such possession

as to put a purchaser on inquiry and charge him with constructive notice. On the contrary, viewed in connection with the other facts found, it was such as to mislead him.

The case of appellant is, therefore, an attempt to set up a secret trust as against *bona fide* purchasers for value without notice. But nothing is clearer than that a purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well known maxim that when equities are equal the law shall prevail. *Williams* v. *Jackson*, 107 U. S., 478; *Willoughby* v. *Willoughby*, 1 T. R., 763; *Charlton* v. *Low*, 3 P. Wms., 328; *Ex parte Knott*, 11 Wis., 609; *Tildesley* v. *Lodge*, 3 Sm. & Giff., 543; *Shine* v. *Goff*, 1 Ball & B., 436; *Bowen* v. *Evans*, 1 Jones & La. T., 264; *Vattier* v. *Hind*, 7 Pet., 252. This is the case of defendants Hooper and Jennings.

II.

THE EXECUTION, FILING AND RECORDING OF THE RELEASE OF THE CHATTEL MORTGAGE BY THE COMMISSION COMPANY, IN WHOM THE RECORD TITLE TO THE CATTLE STOOD, WAS NOTICE TO ALL THE WORLD THAT THE DEBT SECURED BY THE MORTGAGE HAD BEEN PAID AND THAT THE CATTLE WERE CLEARED OF LIENS.

Under this point the following errors assigned are here particularly specified, viz.:

Fourth. The court erred in holding and deciding that "A separate instrument executed by a mortgagee acknowledging satisfaction of a chattel mortgage and payment of the debt secured thereby, but which is not acknowledged before some officer named in the statute and certified to as provided therein is not entitled to record and the filing or recording thereof imports no notice."

Tenth. The court erred in holding and deciding that the release of the chattel mortgage, under which the defendant in error claimed the property in controversy, introduced in evidence, should have been acknowledged before some officer named in the statute.

Eleventh. The court erred in holding and deciding that the release of the chattel mortgage under which the defendant in error claimed introduced in evidence was not entitled to record and that the filing or recording thereof imported no notice.

With the statutes (printed as an Appendix) in full force and effect, and with a chattel mortgage from Grimes to the Commission Company reposing in the office of the register of deeds, that company sent to the recorded the following release (Rec., 62):

RELEASE OF MORTGAGE.

"In consideration of the payment of the debt secured thereby, we, the Siegel-Sanders Livestock Commission Company, of Kansas City, Missouri, do hereby release, cancel and finally discharge the deed of trust or mortgage No. 604 covering 526 head of steers branded—left thigh, given by W. B. Grimes, Jr. to secure the payment of Eleven Thousand One Hundred Eleven and 23/100 Dollars, which said deed of trust or mortgage was dated 6-27-1900, and recorded in the office of the recorder of deeds of Clark County, State of Kansas, in Book ....., at page .....

"WITNESS the seal and signature of this company this 24th day of November, A. D. 1900.

"SIEGEL-SANDERS LIVESTOCK COMMISSION COMPANY,
FRANK SIEGEL,
(Seal.) *P't.*"

The genuineness of the release so executed and filed by the Commission Company is beyond question.

Mr. Manfred Brown, the register of deeds, testified (Rec., 63) that he received this release November 27, 1900, in a letter from Frank Siegel and recorded it on the original instrument as required by law; that during his term as register of deeds he had received letters and other papers signed by Frank Siegel, knew his handwriting and identified the signature on the release as the signature of Frank Siegel. (Rec., 64.) In the answer of the defendant in error to the amended petition it is alleged that Frank Siegel, after the execution of the said note and before the maturity thereof, was the "duly elected, qualified and acting president" of the Siegel-Sanders Live Stock Commission Company. (Rec., 25.)

Mr. H. A. Suttman, cashier of the Stock Yards Bank of Commerce of Kansas City, Missouri, during 1900 and 1901 had business relations and transactions with the Commission Company and with Frank Siegel as president; had seen him write and during the time mentioned was familiar with his handwriting. Upon being shown the signature to the release he said "That is Frank Siegel's signature." (Rec., 71.)

Mr. E. T. Galbraith, receiving teller of the Interstate National Bank of Kansas City since 1890, testified that he knew Frank Siegel, president of the Commission Company, which company kept an account with his bank three or four years; had seen him write and produced handwriting or signature on card which he saw him write; also identified other handwriting of his as genuine. Upon being shown signature on release of mortgage and asked if it was the signature of Frank Siegel he said: "I call that Frank Siegel's genuine signature." (Rec., 74.) He also testified that

the signature on the release was the same signature that appeared on checks presented at his bank by the Siegel-Sanders Live Stock Commission Company.

Mr. W. B. Grimes, Jr., the mortgagor, testified that he was familiar with the signature of Frank Siegel, and that his signature was at the bottom of the release. (Rec., 79.)

Mr. B. R. Grimes testified that for several years he had business transactions with Frank Siegel, president of Siegel-Sanders Live Stock Commission Company; was familiar with his signature, and that the signature on the release was the signature of Siegel, with which he was familiar. (Rec., 82.)

Thus the genuineness of the signature of Frank Siegel, president of the Siegel-Sanders Live Stock Commission Company, to the release of the chattel mortgage, was conclusively proven.

Mr. Manfred Brown, the register of deeds, further testified that the release arrived at the office of the register on November 27, 1906, in a letter from Frank Siegel, president of the Siegel-Sanders Live Stock Commission Company, and that when he received this release he recorded it on the record of the original instrument, as required by law, and then placed it in his office, and attached to the original mortgage the release of the same. (Rec., 63.)

Thornton W. Sargent, of Wichita, Kansas, testified that he was a graduate of the University of Michigan, and was educated in law in the Law Department of the Columbian University of Washington, D. C. (now The George Washington University), and had practiced law in all the courts of Kansas for a period of

nearly sixteen years; also, that, as a practitioner of the law in Kansas, he had had occasion to examine the statutes, session laws and the decisions of the courts of the State construing the same respecting chattel mortgages and was familiar therewith. (Rec., 99.)

He further testifies as follows:

"Q. You may state what the law of the State of Kansas is and was on the 24th day of November, 1900, and the 27th day of November, 1900, as to the manner of releasing chattel mortgages within the State of Kansas? (Rec., 104.)

A. The law was that chattel mortgages should be released; first, by an entry upon the margin of the record by the mortgagee or by an entry on the copy, or by an entry on the original mortgage, OR BY A SEPARATE INSTRUMENT, SIGNED BY THE MORTGAGEE.

Q. State whether or not when made on a separate instrument, the law of the State of Kansas at that time required that separate instrument to be acknowledged?

A. No, sir; it did not.

Q. You may state what the law of the State of Kansas was on the 24th day of November, 1900, and on the 27th day of November, 1900, as to the manner of releasing a chattel mortgage by a separate instrument?

A. It was that the separate instrument should properly refer to the mortgage released and be signed by the mortgagee.

Q. Is that all?

A. That is all." (Rec., 105.)

On cross-examination he stated that the law about which he had testified "is the practice and expression of the lawyers in the part of Kansas where I live, in respect to the law and the construction that they place upon it." (Rec., 106.)

He further testified (Rec., 106):

"Q. I will ask you if an assignee of a chattel mort-

gage or a negotiable promissory note could release it of record under the law you have stated?

A. If he is the assignee of record, the assignee can release it; if he is not the assignee of record, he cannot."

The witness further testified that he gave his answer as "the construction that is placed upon the statutes of Kansas," by the lawyers and the Supreme Court of the state. Finally he repeated:

"I KNOW, *taking the construction as placed upon the chattel mortgage law by our Supreme Court, and the statutes of Kansas and the construction placed upon them by the lawyers,* THAT THAT IS THE LAW AS TO CHATTEL MORTGAGES" (Rec., 107.)

The Supreme Court of the Territory of Oklahoma, held that the release was void and was not entitled to record because it was not acknowledged, but the Supreme Court of Kansas accords to such releases a different consideration.

In *Drumm-Flato Commission Co.* v. *Barnard et al.,* 66 Kansas, 568, one Hale executed a chattel mortgage to the Commission Company on October 20, 1899 to secure a promissory note. The chattel mortgage covered 249 head of cattle. It was filed for record in the office of the register of deeds of Greenwood County on October 30, 1899. Thereafter 40 head of the cattle were released from this chattel mortgage, by the following instrument, viz.:

"RELEASE.

"KNOW ALL MEN BY THESE PRESENTS: That Drumm-Flato Commission Company, mortgagee, hereby releases forty (40) head of one- and two-year-old native steer cattle, branded H on the left hip or J. H. on right hip. Out of a certain chattel mortgage executed by

P. L. Hale, October 20, 1899, on 249 head of one- and two-year-old steer cattle and 93 head of other cattle of various kinds and ages. Said chattel mortgage was filed for record by the register of deeds of Green wood County, Kansas, on October 30, 1899. Said register of deeds of Greenwood County, Kansas, is hereby authorized to release and discharge the above-described 40 head of cattle from the records.

Kansas City, Missouri, December 23, 1899.

DRUMM-FLATO COMMISSION CO.
Per F. W. FLATO, JR.,
Vice-President."

As will be observed, this release was not acknowledged. In the spirited litigation between the parties through all the courts none of the able counsel ever hinted that the release was irregular in any particular. The Supreme Court of Kansas affirmed it and held that it could not be "enlarged, contradicted or varied" by parol testimony. If the release had not been entitled to record the judgment would have gone the other way. In a dissenting opinion Judge Pollock said:

"It is not even contended that the plaintiff made any representations concerning its mortgage lien except those expressed in the release and mortgage. Its mortgage was of record; *the release speaks for itself.*"

It may be said that the validity of the release was not drawn in question and therefore the *Drumm* case is no authority here. The point we make is that in addition to Sargent's testimony that the release was good, we find releases of a similar character to the one in the case at bar passing through the courts of Kansas in a spirited litigation without hint by court, counsel or litigants of any irregularity.

To the contention that the release was irregular in that it was not acknowledged, the answer is, that it was

good between the parties of record anywhere and for any purpose, and from all the record disclosed the parties of record were the only persons concerned. It was on the record that the Chicago Bank relied. The Supreme Court of Oklahoma declared the release null and void and not entitled to record and in the same breath said (Rec., 148): "And even if the Chicago Bank had examined this release, it was bound to know that it was not in form and would not be binding, *except as between Grimes and the Siegel-Sanders Company. As between them it was simply an acknowledgment of the payment of the debt.*" If the release was an acknowledgment of the payment of the debt secured by the mortgage, then the mortgage presumably died with the extinguishment of the debt, for as between the parties on the record the transaction was at an end.

In *Carpenter* v. *Longan*, 16 Wall., 271, Mr. Justice Swayne quoted with approval from *Pierce* v. *Faunce*, 47 Maine, 513, as follows:

"In all cases the reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects."

Who may say, then, that when the release was filed by the Commission Company, acknowledging payment of the notes, that the Chicago Bank had no right to believe and to act on the belief that the mortgage securing the notes had also expired with the payment of the notes? So much for the release.

Conclusion.

In order to prevail against a *bona fide* purchaser, it is submitted that the laws of the State of Kansas imply that assignments of chattel mortgages shall be recorded, and it is enough if the laws of that state *permit* the recording of such an assignment. That the laws of that state do permit the recording of such an assignment is conclusively shown by the opinion in *Thomas* v. *Reynolds, supra,* by Mr. Justice Brewer, and in *Parkhurst* v. *First National Bank of Clyde supra,* by Chief Justice Horton. As was said by the Supreme Court of Indiana in *Connecticut Mutual Life Insurance Co.* v. *Talbot, supra,* "It is assumed everywhere that, if the recording acts *afforded* the assignee of a mortgage the *opportunity* of giving notice of his rights by procuring and putting of record an assignment of the mortgage, neglect on his part to do so will estop him from asserting the invalidity of a duly recorded release executed by his assignor, after an innocent purchaser has paid his money on the faith of the public record."

When the conduct of the respective parties is thrown into the scales the equities are unquestionably in favor of the Chicago Bank. The Geneseo Bank, instead of giving notice to all the world of the assignment of the notes to it, notwithstanding "how easy it is for the assignee of the notes or debt thus secured to protect himself," secretly and negligently withheld the same when "the spirit, if not the very letter, of the recording law required it." If the Geneseo Bank had expended one dollar for recording and a two-cent

stamp for mailing the mortgage to the register at Ashland, it would have saved a litigation covering a period of five years, resulting in great loss to both litigants. Instead, it left it in the power of that Commission Company to swindle somebody.

Therefore, we contend that by the negligence of the Geneseo Bank in failing to take and to record an assignment of the mortgage, the Chicago Bank as an innocent purchaser for value without notice—and a higher standing it could not acquire in any court—was lured into the trap set by the Commission Company, and baited with its release, all of which by the mere turning of the hand,—the slightest precaution on the part of the Geneseo Bank,—would have been avoided. It is a weak argument and contrary to the spirit of the laws of Kansas or of any other community, which says that a secret assignment of a note carries with it a chattel mortgage on hundreds of cattle without a scratch of a pen, as against a *bona fide* purchaser, without notice, who walked up and paid out his money on the faith of a public record whose proclamation to the world was contrary to the terms of the secret.

Finally, when this court is put in the position of either approving a secret assignment and ignoring a public record of the state; or, of disregarding such secret assignment and recognizing such public record, the court should protect the bank that relied on the record, and throw the loss upon the bank which was a party to the secret and which should rightfully bear the burden. Again, using the language of Mr. Justice Swayne in *Carpenter* v. *Longan, supra,* we insist, "If one of two innocent persons must

suffer by a deceit, it is more consonant to reason that he who 'puts trust and confidence in the deceiver should be a loser rather than a stranger.' "

The judgment of the Supreme Court of the Territory of Oklahoma should be reversed.

Respectfully submitted.

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APPENDIX.

STATUTES OF KANSAS.

The statutes of the State of Kansas existing during the various transactions set forth may be found in General Statutes of Kansas for 1901, by Dassler. For convenience we print them as follows:

Paragraph 36, Section 4251, relating to mortgages of personal property, provides:

"When any mortgage of personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, his assignee or personal representative, to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be, and under the same penalty for a neglect or refusal, as provided in case of a satisfaction of mortgages of real estate. The entry of satisfaction shall be made in the book in which the mortgage is entered, as hereinbefore provided; and any instrument acknowledging satisfaction shall not be recorded at length, but shall be referred to under the head of 'Remarks,' and filed with the mortgage or copy thereof, and preserved therewith in the office of the register."

Paragraph 34, Section 4249, relating to mortgages of personal property, provides:

"The register of deeds shall keep a book in which shall be entered a minute of all mortgages of personal property and affidavits filed under this act. Such book shall be ruled off into separate columns, with heads as follows: 'Time of Reception,' 'Name of Mortgagor,' 'Name of Mortgagee,' 'Date of Instrument,' 'Amount Secured,' 'When due,' 'Property Mortgaged,' and 'Remarks.' The proper entry shall be made under each of said heads. Under the head of 'Property Mortgaged,' it will be sufficient to enter a general description of the property, and the particu-

lar place where located. The date of filing any affidavit, and the amount sworn to be due and unpaid, shall be entered under the head of 'Remarks.' An index to said book shall be kept in the manner as required for other records."

Paragraph 6, Section 4221, relating to mortgages of real estate, provides:

"Any mortgage of real property that has been or may hereafter be recorded may be discharged by an entry on the margin of the record thereof, signed by the mortgagee or his attorney, assignee or personal representative, acknowledging the satisfaction of the mortgage in the presence of the register of deeds or his deputy, who shall subscribe the same as a witness. A mortgage may be released by a receipt endorsed thereon, signed by the mortgagee, his agent or attorney, which receipt may be entered on the margin of the record, and shall have the same force and effect as the entry on the margin of the record, as provided in this section."

Paragraph 7, Section 4222, relating to mortgages of real estate, provides:

"Any mortgage shall also be discharged upon the record thereof by the register of deeds whenever there shall be presented to him an instrument acknowledging the satisfaction of such mortgage executed by the mortgagee, his duly authorized attorney in fact, assignee or personal representative, and duly acknowledged and certified, as other instruments affecting real estate."

Paragraph 9, Section 4224, relating to mortgages on real estate, provides:

"When any mortgage of real property shall have been paid, it shall be the duty of the mortgagee or his attorney within thirty days after demand, in case demand can be made, by the mortgagor, his heirs or assigns, or by anyone acting for such mortgagor, his heirs or assigns, to enter satisfaction or cause satisfaction of such mortgage to be entered of record without

charge; and any mortgagee, or assignee of such mortgage who shall refuse or neglect to enter satisfaction of such mortgage as is provided by this act shall be liable in damages to such mortgagor or his grantee or heirs, in the sum of one hundred dollars, together with a reasonable attorney's fee for preparing and prosecuting such suit; and the plaintiff in such action may recover any additional damages that the evidence in the case will warrant. Civil actions may be brought under this act before any court of competent jurisdiction, and attachments may be had as in other cases."

Paragraph 19, Section 4234, relating to mortgages of real estate, provides:

"All assignments of real estate mortgages hereafter made shall be acknowledged by the assignor in the manner provided for the acknowledgment of other instruments affecting the title to real estate, and all such assignments shall clearly set forth the full name of the assignee, together with his postoffice address."

Paragraph 26, Section 4241, relating to mortgages of real estate, provides:

"On presentation of such assignment for record, the register of deeds shall enter the same on the margin of the record of said mortgage, and shall attest the same as having been written on the original mortgage and copied therefrom, or words of a like import."

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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 233.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, *Plaintiff in Error,* **vs.** **FIRST NATIONAL BANK OF GENESEO, ILLINOIS,** *Defendant in Error.*	**Error to the Supreme Court of the Territory of Oklahoma.**

REPLY OF PLAINTIFF IN ERROR TO BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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BLACKBURN ESTERLINE,
EARLE W. EVANS,
Of Counsel.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 284.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, *Plaintiff in Error,* *vs.* **FIRST NATIONAL BANK OF GENESEO, ILLINOIS,** *Defendant in Error.*	**Error to the Supreme Court of the Territory of Oklahoma.**

REPLY OF PLAINTIFF IN ERROR TO BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

I.

JURISDICTION.

Counsel for the defendant in error deny the jurisdiction of this court, because:

(a) The case is here by writ of error rather than by appeal, and,

(b) They insist the statute has not been complied with in that there is no special finding of facts.

A.

This is an action in replevin, tried in the District Court of the Territory of Oklahoma, without the intervention of a jury; the jury by written stipulation being waived. (Rec., 34-35.) The amount in controversy exceeds $14,000.

That the case is properly here by writ of error is concluded by *Comstock* v. *Eagleton*, 196 U. S., 99; *Oklahoma City* v. *McMaster*, 196 U. S., 529; and *Guss et al.* v. *Nelson*, decided by this court January 15, 1906.

B.

Counsel say:

> "Of course it goes without saying that the Oklahoma Supreme Court when it delivered its opinion never supposed that it was making a finding of facts in the nature of a special verdict in the case." (Br., 7-8.)

In this contention, counsel are clearly erroneous. In rendering the opinion and judgment of the Supreme Court of the Territory of Oklahoma on the second appeal, Judge Burwell said (Rec., 139):

> "This case was originally tried in the District Court of Woodward County, and judgment rendered in favor of the National Live Stock Bank of Chicago. The First National Bank of Geneseo appealed, and this court reviewed the record, and promulgated an opinion, in which it made a *full statement and finding of facts*, and enunciated the law as applied thereto, reversing judgment of the lower court, and remanded the case, directing a new trial—76 Pac., 130.
>
> "On the second trial in the lower court it was

> agreed between the parties that a jury be waived and the case submitted to the court as made on the first trial. Judgment was rendered in favor of the Genesco Bank, and the Chicago Bank appeals to this court. No new question is raised on this appeal. The record is the same as stated in our former opinion, and we are fully satisfied with the law as therein declared."

It thus appears that the Supreme Court of the Territory of Oklahoma *did* suppose that it was making a finding of facts, for it specifically and emphatically so declared. Nor was the Supreme Court of the Territory content to say that it made a finding of facts, or a statement of facts, or a statement and finding of facts; but in order that its statement and finding of facts might not be drawn in question thereafter, it specifically and emphatically declared its statement and finding of facts to be "a *full* statement and finding of facts." We submit the emphatic declaration of the Supreme Court of the Territory of Oklahoma, that it made "a full statement and finding of facts," is a compliance with counsel's own construction of the statute.

But ignoring the full statement and finding of facts the argument that the record contains no special finding of facts by the Supreme Court of Oklahoma is unavailing for the following reasons:

1. Sections 649 and 700 of the Revised Statutes of the United States, are as follows:

> "Sec. 649. Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the

facts, which may be either general or special, shall have the same effect as the verdict of a jury.

"Sec. 700. When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to Section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

The record contains a case-made, which, under the Oklahoma practice, is a bill of exceptions.

The release of the chattel mortgage securing the notes of the Geneseo Bank was offered in evidence at the trial, objected to by the counsel for that bank, admitted by the court over the objection, and exception to the ruling duly taken.

Thus under the statute, the effect of the release so admitted in evidence over the objection and exception of the defendant in error, as shown by the bill of exceptions, is before this court for consideration.

In the examination of Manfred Brown, Register of Deeds of Clark County, Kansas (Rec., 53), he was asked concerning the release, which was designated as "Exhibit C" to his deposition. When the release was handed to the witness by counsel for the Chicago Bank, counsel for the Geneseo Bank objected as follows:

"I object to any testimony concerning "Ex-

hibit C" for the reason that the same is incompetent, irrelevant and immaterial,"

and

"further, not binding on the defendant; the signature is not shown to be genuine, is not properly executed, is not acknowledged and is not witnessed."

The trial court held that the release was sufficiently identified, and the release was then read in evidence (Rec., 97). Later (Rec., 64), the release, as "Exhibit C" was formally offered in evidence, and was attached to the testimony of the witness Brown as a part thereof, over the objection of the counsel for the Geneseo Bank.

"Defendant objects to the introduction of 'Exhibit C' (the release) for the reason that the signature has not been shown to be genuine, and is not properly executed, and is not acknowledged, is not witnessed, and is incompetent, irrelevant and immaterial." (Rec., 64.)

Again, during the testimony of H. A. Suttman (Rec., 71), counsel for the Chicago Bank referred to the release and asked the witness to identify the signature thereto. After the signature was identfied, counsel offered the release, to which offer counsel for the Geneseo Bank said:

"We object to the introduction of that in any form or manner, as incompetent, irrelevant and immaterial and not binding on the defendant."

The court said:

"It may go in evidence with the right to reserve and determine its competency afterwards."

W. B. Grimes, Jr. (Rec., 79), identified the signature of Frank Siegel to the release. He was asked when

he first saw "Exhibit C" (the release), which was objected to by counsel for the Geneseo Bank, which objection the court sustained, to which ruling of the court counsel for the Chicago Bank excepted. (Rec., 81.)

No question was raised concerning the admission in evidence of the release after it was admitted The Supreme Court of the Territory did not review the ruling on the admissibility of the release in evidence. In that court we advanced no argument on the question in our original brief, and counsel for the Geneseo Bank did not question the admissibility of the release in their brief. From the beginning of this case, the whole contention has been, not on the admissibility in evidence of the release, but on the legal *effect* of the release after it is in evidence. Counsel for the Geneseo Bank, on page 26 of their brief say:

> "The contention here will be over the effect of this release."

And on page 41 of their brief they say under point VII:

> "The release of the mortgage of the Geneseo Bank was void because the same was not acknowledged. It was improperly recorded for that reason. What is said by the Supreme Court of Okalahoma in its opinion in this case, commencing at page 147 of the printed record herein, fully covers this point."

We submit that by adopting the language of the Supreme Court of the Territory, and their argument on the effect of the release, counsel concede that the release was good as between the mortgagor Grimes, and the Commission Company, the party holding the

record title, for in its opinion, the Supreme Court of the Territory said:

> "And even if the Chicago Bank had examined this release it was bound to know that it was not in form and would not be binding *except as between Grimes and the Siegel-Sanders Company. As between them it was simply an acknowledgement of the payment of the debt.*"

Notwithstanding the opinion of the Supreme Court of Oklahoma, we insist that the release was entitled to record, because the undisputed testimony of the witness Sargent, a Kansas lawyer learned in the law (pages 46, 47, 48 of our original brief), shows that the release was good between the parties of record, and the *Drumm-Flato* case (page 48 of our original brief) shows that such releases are passing through the courts of Kansas without question. This, with the admission of counsel for the Geneseo Bank that the release was good between the parties of record makes further argument in addition to our original brief commencing page 43, unnecessary. When the debt secured by the mortgage was paid, as the release clearly showed, the mortgage died with it as between the parties on the record.

(2) All of the material facts in this record were stipulated by the parties.

In the Supreme Court of Oklahoma, and in this court, we have assumed that all the facts so stipulated would be given full faith and credit. Counsel for the Geneseo Bank have proceeded on the same assumption. On pages 20, 21, 22, 23, 24 and 25 of their argument, they have specificially set out these stipulations, have called the attention of the court thereto, and

requested this court to consider the same. The court has uniformly held that agreed facts will have the same force and effect as a special finding of facts.

In *Insurance Co.* v. *Tweed,* 7 Wall., 44, counsel agreed that certain facts recited in the opinion of the court were the material facts in the case, and this court treated them as facts found by the court. Mr. Justice Miller, in delivering the opinion, said (p. 51):

> "But the counsel for both parties in this court have agreed to certain parts of that opinion as containing the material facts of the case, and to treat them here as facts found by the court; and inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made."

In *Supervisors* v. *Kennicott,* 103 U. S., 554, the court speaking through Chief Justice Waite, said (p. 556):

> "2. As to the finding. Even before the act of 1865, c. 86, sect. 4 (13 Stat. 501, reproduced in sects. 649 and 700, Rev. Stat.), it was always held that a judgment on agreed facts spread at large on the record could be reviewed here on a writ of error. *United States* v. *Eliason,* 16 Pet., 291; *Simpson* v. *Baltimore & Susquehanna Railroad Co.,* 10 How., 329; *Graham* v. *Bayne,* 18 id., 60; *Suydam* v. *Williamson,* 20 id., 427; *Campbell* v. *Boyreau,* 21 id., 223; *Burr* v. *DesMoines Company,* 1 Wall., 99. Such a statement was considered to be equivalent to a special verdict and to present questions of law alone for the consideration of the court. It is manifest that the act of 1865 was not intended to interfere with this practice. The evident object of that leglislation was to give special findings the same effect for the purposes of a writ of error as a special verdict or an agreed case."

In *Lehnen* v. *Dickson,* 148 U. S., 71, this court said (p. 73):

> "It is true, if there be an agreed statement of facts submitted to the trial court and upon which its judgment is founded, such agreed statement will be taken as the equivalent of a special finding of facts. *Supervisors* v. *Kennicott,* 103 U. S., 554. Doubtless, also, cases may arise in which, without a formal special finding of facts, there is presented a ruling of the court, which is distinctly a ruling upon a matter of law, and in no manner a determination of facts, or of inferences from facts, in which this court ought to and will review the ruling. Thus, in *Insurance Company* v. *Tweed,* 7 Wall., 44, where on the argument in this court counsel agreed that certain recitals of fact made by the trial court in its opinion or 'reasons for judgment,' as it was called, were the facts in the case, and might be accepted as facts found by the court, it was held that, as they could have made such agreement in the court below, it would be accepted and acted upon here, and the facts thus assented to would be regarded as the facts found or agreed to upon which the judgment was based; and upon an examination it was further held that they did not support the judgment, and it was reversed."

In *Wilson* v. *Merchants Loan & Trust Co.,* 183 U. S., 121, the court said (p. 127):

> "In this case the finding is general, and, strictly construing the statute, the only questions which would be reviewable would be those questions which arose during the progress of the trial, and which were presented by bill of exceptions. It has, however, been held that where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts. *Super-*

> *visors* v. *Kennicott*, 103 U. S., 554. But as such equivalent, there must of course be a finding or an agreement upon all ultimate facts and the statement must not merely present evidence from which such facts or any of them may be inferred."

In the very late case of *Guss et al.* v. *Nelson*, decided January 15, 1906, opinion by Mr. Justice Brewer, there was no special finding of facts made either by the District Court or the Supreme Court. In the early lines of his opinion Mr. Justice Brewer said:

> "Considering the writ of error, we remarked that no rulings were made in respect to the admission or rejection of testimony presenting anything worthy of consideration. No special findings of facts were made by either the District or Supreme Court, the former finding generally the issues in favor of the plaintiff, and rendering judgment upon such general finding, and the latter merely discussing the right of recovery upon the findings and such general finding."

The case involved the construction of a contract,—purely a question of law; no special finding of facts was necessary. This court made a statement of the case and delivered an opinion and judgment thereon. So in the case at bar. There is no issue of fact. The record presents pure questions of law.

Thus, we submit the case is properly here by writ of error, and the questions presented for review are preserved in the record in the manner prescribed by the statute under the decisions of this court.

II.

THE MERITS.

We shall now reply to defendant's argument on the merits of the case.

Counsel insist that the Chicago Bank cannot rely upon the claim that it was a *bona fide* purchaser for value without notice, because it did not make that claim or take that position in its pleadings.

The argument of counsel upon this point is a criticism of our course in pleading *facts* instead of *conclusions*. We sought in our pleadings to set up facts from which the court could conclude the legal rights of the parties. Our action in that behalf complies with the rules of pleading so well established that reference to them here is unnecessary.

The Chicago Bank avers in its amended petition (Rec., 20), that it relies upon its chattel mortgage bearing date April 17, 1901. The Geneseo Bank, in its answer, sets up that it relies upon its mortgage dated June 27, 1900. And the Chicago Bank, in its reply to said answer avers that the notes secured by the mortgage set up in defendant's answer were paid by the giving of a new note by the mortgagor to the original mortgagee. That immediately thereafter the mortgage of the Geneseo Bank was satisfied of record by the original mortgagee, and the release evidencing such satisfaction is set out as "Exhibit A" to the reply. (Rec., 32.)

There is no rule of code or common law pleading which requires the Chicago Bank to set forth in its

pleadings the evidence by which it proposed to support those pleadings. We submit the pleadings clearly put in issue the material question in this controversy. That is, whether the Chicago Bank, having made its loan relying upon the release of record of the mortgage securing the loan owned by the Geneseo Bank should not, as against the Geneseo Bank, be protected, and that the Geneseo Bank, by failing to take and record an assignment of its mortgage, left it within the power of the mortgagee as against the right of the Chicago Bank, the *bona* fide purchaser of notes secured by a subsequent mortgage, to fraudulently release the the mortgage upon which it, the Geneseo Bank, relied.

Thus, we say, the Chicago Bank has pleaded the *fact* rather than the *conclusion*, that it was a *bona fide* purchaser for value without notice.

It is also claimed the Chicago Bank did not advance its money after the release was filed for record, relying upon the faith thereof. Neither on the trial of this case in the *nisi prius* court, nor in the Supreme Court of Oklahoma, did counsel attempt to make this point, and we submit they cannot now raise it for the first time.

The release in question shows it was filed for record on the 27th day of November, 1900, and the chattel mortgage relied on by the Chicago Bank bears date April 17, 1901. Meanwhile, in February, 1901, the Chicago Cattle Loan Company, whose president was also the president of the Chicago Bank, caused the records to be inspected, and that inspection disclosed the fact of the release on November 27, 1900, of the

Geneseo Bank's mortgage. The fact the Chicago Cattle Loan Mortgage was taken prior to the filing of this release, and the Chicago Bank's mortgage was but a renewal or extension of the same loan, is no argument against the position of the Chicago Bank, and does not support counsel's contention against the undisputed fact supported by the testimony of the witnesses Doud and True, to which counsel refer, that the Chicago Bank did rely upon the release.

But for the sake of the argument, let us assume, as against the stipulated facts, that the Cattle Loan Company held a second mortgage upon the cattle, and that the Geneseo Bank held a first mortgage. That is no argument or reason why the Chicago Bank should continue in the same position as the Cattle Loan Company. At the time of the maturity of the Cattle Loan mortgage, assuming as aforesaid for the purpose of the argument that it was a second mortgage, it might have been able to have collected its debt from the maker of the notes, without relying upon the mortgage, or it might have had other means of enforcing the collection. We submit the presumption is, and this presumption is supported by the undisputed facts, that neither it nor the Chicago Bank was willing to extend that loan without the security of the mortgage, and to that end it caused the records to be carefully examined.

Counsel argue throughout their brief that the Chicago Bank is not a *bona fide* purchaser for value without notice, because it took its notes as a renewal of notes and mortgage to the Chicago Cattle Loan Company; that the original notes and mortgage

held by the Cattle Loan Company were executed October 17, 1900, and were held by that company before the release was filed. This argument is contrary to the express stipulation of the parties, as set forth in counsel's own brief, thus (Br., 20):

> "That the mortgage held by the plaintiff, Chicago Bank, was executed by W. B. Grimes, Jr., in Clark County, Kansas, dated April 17, 1901, and securing two promissory notes, each for the sum of $7,694.77 of even date with said mortgage, and payable October 27, 1901, to the Siegel-Sanders Live Stock Company, executed by W. H. Grimes, Jr., as mortgagor, to the Siegel-Sanders Live Stock Commission Company as mortgagee; that said last mortgage was filed for record in the office of the register of deeds of Clark County, on April 25, 1901, and duly recorded in book 6, at page 132; that said last mortgage was duly acknowledged by said W. B. Grimes, Jr., before M. G. Stevenson, a notary public of Clark County, Kansas, on April 19, 1901."

It was further stipulated (Br., 20) that the notes held by the Chicago Bank were, at the date of the commencement of this suit, and still are, due and unpaid. It was also stipulated (Br., 22) that the notes held by the Chicago Bank were and have been, since the date of April 17, 1901, held and owned by the Chicago Bank, that the chattel mortgage securing the notes has, since the 27th day of April, 1901, been continuously held and owned by said Chicago Bank, and that nothing has ever been paid on said notes, or either of them.

Concerning this mortgage, the Supreme Court of the territory, basing its decision upon the testimony of the witness True and the witness Doud, found:

> "And it (Chicago Bank) believed at the time it bought these notes (the notes secured by the

mortgage dated April 17, 1901), that the mortgage securing them was a first lien on the cattle, and it secured this information from Mr. True who personally examined the record."

This position of the Chicago Bank is supported by the stipulations. By written stipulation it was agreed between the parties (Rec., 34) that the 526 head of cattle should be valued at $24 per head. This would make their agreed value $12,624. If the Chicago Bank had knowledge, when it purchased its notes on April 17, 1901 that the Geneseo Bank already had a live mortgage on the cattle for $11,111.33, which was almost their actual value, it follows that the officers of the Chicago Bank were so insane as to invest $15,389.54 more in the cattle. This fact alone is enough to explode the theory of counsel for the Geneseo Bank that the Chicago Bank invested $15,389.54 in notes secured by chattel mortgage on the cattle, upon which it then knew the Geneseo Bank had a prior lien amounting to $11,111.23.

It is also insisted the Chicago Bank is not a *bona fide* purchaser, because it failed to make inquiry when it purchased its notes as to the whereabouts of the notes held by the Geneseo Bank secured by first mortgage, and for failure to make such inquiry counsel argue the Chicago Bank was negligent, and cannot rely solely upon the release. The argument is that the Chicago Bank should have compelled production of the notes by the Commission Company, and should have obliged the latter to prove that the release executed by the Commission Company, and filed for record, was not a falsehood; and it is persistently stated that it was the duty of the Chicago Bank to go about making in-

quiry as to the truthfulness of the transaction evidenced by the release of the Commission Company duly filed for record.

Preliminary to a discussion of the legal obligation of the Chicago Bank in that behalf, we ask counsel whether it would not have been absurd for the Chicago Bank to have assumed that had it made such inquiry of the Commission Company it would have received any other or different information than that shown by the solemn release of the Commission Company duly executed and filed for record? Would it be possible for the Commission Company to have consistently filed for record a release reciting the payment of the notes held by the Geneseo Bank, and yet have answered any inquiry contradictory of its act in that behalf? No claim is made that the Chicago Bank knew, or had any means of knowing that the Commission Company had negotiated the notes; on the contrary, the Chicago Bank assumed, as it had a right to assume, that the Commission Company, being the original mortgagee, no assignment to any other appearing of record, not only had the right and was the only party having the power to execute the release, or to acknowledge payment of the notes secured by the mortgage, and that it had surrendered the past due notes, cancelled, to the mortgagor.

As a matter of law, this argument of counsel is conclusively met by:

Williams v. *Jackson*, 107 U. S., 478;
Lennertz v. *Ouilty*, 191 Ill., 174, and
Thomas v. *Reynolds*, 29 Kans., 216.

In the last case, as the court will remember, Mr.

Justice Brewer said that a release by any other than the person having the title of record would have been "an impertinent interference."

An attempt is made to excuse the negligence of the Geneseo Bank in failing to take and file an assignment of its mortgage, by the assertion that there was no law of the State of Kansas which permitted the defendant, the Geneseo Bank, to obtain and file such assignment.

Our contention is and always has been, that there was no law of the State of Kansas which *prohibited* the Geneseo Bank from failing to protect itself in this behalf. And that common prudence demanded it should, by taking and filing such assignment, insure to itself the security afforded by the mortgage, and thereby prevent a subsequent fraudulent release by the original mortgagee.

There is no law in Illinois requiring, or even specifically authorizing the holder of notes secured by a mortgage, to take and file an assignment of record, but as we have seen from the cases cited in our original brief, the Supreme Court of the State of Illinois has repeatedly held that failing so to do, the rights of the assignee of such mortgage are postponed to those of a subsequent *bona fide* purchaser who has acquired an interest in the property relying upon a fraudulent release by him in whom the record showed sole power to execute such release, and that it was not only the right, but the *duty*, of the assignee of a mortgage to take and file an assignment.

Counsel have found no case holding to the contrary, and we submit the authorities cited by us under point I of our original brief are conclusive.

The cases cited by counsel from the Supreme Court of Kansas, and particularly *Burhans* v. *Hutcheson*, and *Insurance Co.* v. *Huntington*, have no application to the case at bar, because in none of the Kansas cases were the rights of a *bona fide* innocent purchaser involved.

In the consideration of this case it must be continuously kept in mind that the Chicago Bank is a subsequent purchaser in good faith without notice, and that not only was it without notice of any claim or lien of the Geneseo Bank, but it did all the law required of it, *i. e.*, examined the records and found the title to the property clear.

Counsels' difficulty in this case is because of their failure to discriminate between the rights of an innocent purchaser without notice, and of one with full notice. The cases cited by them clearly indicate their misapprehension, and are therefore not in point.

We do not contend, and never have contended, that the wrongful release as between the Commission Company and the Geneseo Bank in any way impaired the lien of the mortgage securing the notes held by the Geneseo Bank as between the Commission Company and that bank, in the absence of a *bona fide* purchaser for value without notice. But that is not this case. It is immaterial to the Chicago Bank, and to this controversy, whether the release by the Commission Company was fraudulent as between that company and the Geneseo Bank. The question presented here is the respective rights of the two banks.

In *Windle* v. *Bonebrake et al.*, 23 Fed. Rep., 165, an

opinion was rendered by the Circuit Court of the United States for the District of Kansas by Judge Foster, Judge Brewer concurring. In that case Bonebrake and wife executed in Kansas a negotiable bond and mortgage to Stover for $500, payable five years after date, at a bank in Pennsylvania. Stover placed the mortgage on record and then sold and transferred the note and mortgage to Hurd, who sold and transferred them to Windle, who became the *bona fide* holder. After Bonebrake and wife had executed and delivered the mortgage they sold and conveyed the real estate to Boydston subject to the mortgage, who sold it to Likes, who sold and conveyed it to Sheer. When Sheer purchased the property there was no assignment of the mortgage on record and he had no knowledge of the assignment of the mortgage, although the record showed it was in existence and uncancelled. Stover falsely represented to Sheer that he (Stover) still owned the mortgage and held it in his possession and would cancel it if Sheer paid him the money. Sheer paid Stover the money and Stover, without authority, cancelled the mortgage on the record. The question then arose whether Sheer or the plaintiff had the first lien. The court recognized the rule laid down in *Carpenter* v. *Longan*, 16 Wallace, 271, that the bond and mortgage were inseparable when the purchaser of the property took it knowing that the mortgage was unpaid. In the case at bar the Chicago Bank did not know that the mortgage had not been paid. On the contrary, its payment was acknowledged by the mortgagee who presumably was the only person who had the power to acknowledge payment of it. In deliver-

ing its opinion and judgment the court said (page 167):

> "Had Sheer found the record of the mortgage released and satisfied by the mortgagee, and he had no actual notice of the assignment, or that the debt was unpaid, he might well have relied on the record; and in such a case he would take the land free of incumbrance, although the record may have been released by fraud, accident, or mistake, or merger of titles. Jones Mortg., Sec. 472; *Purdy* v. *Huntington*, 42 N. Y., 334; *Gillig* v. *Maas*, 28 N. Y., 191; *Brown* v. *Blydenburg*, 7 N. Y., 141; *Kellogg* v. *Smith*, 26 N. Y., 18; *Van Keuren* v. *Corkins*, 66 N. Y., 77; *Bank* v. *Anderson*, 14 Iowa, 544; *Vannice* v. *Bergen*, 16 Iowa, 555; *McClure* v. *Burris*, id., 591; *Cornog* v. *Fuller*, 30 Iowa, 212; *Bowling* v. *Cook*, 39 Iowa, 200; *Baldwin* v. *Sager*, 70 Ill., 505; *Ogle* v. *Turpin*, 102 Ill., 148; *Ayers* v. *Hays*, 60 Ind., 452; *Etzler* v. *Evans*, 61 Ind., 56."

The principle here laid down, fortified by the authorities, many of which are cited in our original brief, is the exact principle for which we are contending and under which we claim the Chicago Bank is a *bona fide* purchaser for value without notice and had the right to rely upon the record, in all respects regular.

Conclusion.

We submit this court has jurisdiction on the writ of error; that the full statement and finding of facts of the Supreme Court of the Territory of Oklahoma is a compliance with the statute; that this Court will hear and determine the case on the bill of exceptions; that the stipulations of the parties, spread upon the record, are equivalent to a special finding of facts;

that the Chicago Bank properly pleaded the facts which entitled it to claim and prove that it was a *bona fide* purchaser for value without notice; that the Chicago Bank was not bound to make inquiry of the Commission Company as to the truth or falsity of the record; that the Chicago Bank *is* a *bona fide* purchaser for value without notice; that it was the duty of the Geneseo Bank to take and record an assignment of the chattel mortgage securing the note, in order to protect itself against the fraud of the Commission Company; that the Geneseo Bank left it within the power of the Commission Company to execute and record the release upon which the Chicago Bank in good faith acted, and that the Geneseo Bank now should abide by the consequences of its negligence.

It is respectfully submitted the Chicago Bank is entitled to the judgment of the court reversing the judgment of the Supreme Court of the Territory of Oklahoma.

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JAMES H. McKENNEY,
Clerk.

[redacted]

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1905.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, *Plaintiff in Error,*
vs.
FIRST NATIONAL BANK OF GENESEO, ILLINOIS, *Defendant in Error.*

33

Error to the Supreme Court of the Territory of Oklahoma.

Statement of the Case, Brief and Argument

for the Defendant in Error.

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Error to the Supreme Court of the Territory of Oklahoma.

Statement of the Case, Brief and Argument

for the Defendant in Error.

STATEMENT OF THE CASE.

Two questions arise in this case: 1. Does this court have jurisdiction of this case? 2. If this court does have jurisdiction of the case, should the judgment brought up for review be affirmed? If this court does not have jurisdiction, of course, that is the end of the case.

On two grounds we think this court is without jurisdiction.

This is a law action in replevin which was tried twice in the trial court in Oklahoma, without a jury each time, and the case is brought to this court by a writ of error from the Supreme Court of Oklahoma, and not by an appeal. Again, there was no finding of facts in the nature of a special verdict, either in the District Court of Woodward County, Oklahoma, where the case was tried, or in the Supreme Court of Oklahoma, from which court it comes to this court by writ of error.

It is submitted, first, that this case is wrongly brought to this court by writ of error and that it should have been brought here by appeal.

It is submitted, in the second place, that, even if the case were here by appeal, it is not cognizable here, because there is no special finding of facts by any of the courts in Oklahoma.

The action was brought (p. 5, printed Record) in the District Court of Woodward County, Oklahoma, by the plaintiff in error as plaintiff against the defendant in error, as defendant.

As already stated, the action was in replevin to recover a bunch of cattle. The pleadings of the parties may be found from p. 6 to p. 32 of the printed Record. Those pleadings consist of an amended petition of the plaintiff, answer of the defendant and reply thereto of the plaintiff. The cause was tried in the District Court of Woodward County, Oklahoma, April 24, 1902, before the court without the intervention of a jury (p. 37, printed Record).

The stipulation under which said cause was tried by the court without a jury may be found at p. 34, printed Record.

The judgment of the Woodward County District Court at that trial was in favor of the plaintiff, the Chicago bank, and against the defendant, the Geneseo bank.

Thereafter the defendant, the Geneseo bank, removed the case to the Supreme Court of Oklahoma, where it was heard, and on March 4, 1904, was decided by the Oklahoma Supreme Court, by the reversal of the judgment of said District Court and the remanding of the cause for further trial. The opinion of said Supreme Court delivered on March 4, 1904, reversing said judgment and remanding the cause for re-trial, may be found from p. 140 to p. 150 of the printed Record.

Afterwards, on April 18, 1904, said cause was again tried by the District Court of Woodward County, Oklahoma, by the court without a jury, which was again waived by the parties (p. 36, printed Record), and final judgment in said cause given for the defendant, Geneseo bank, against the plaintiff, Chicago bank.

The journal entry of that finding and judgment may be found from p. 132-134 of the printed Record.

The case again went to the Supreme Court of Oklahoma, this time being removed by the Chicago bank, and, on February 11, 1905, the Oklahoma Supreme Court affirmed the second judgment given in the cause by the Woodward County District Court.

The opinion of the Oklahoma Supreme Court on the second hearing of the cause may be found at p. 139 of the Record.

Thereafter, and in May, 1905, the plaintiff, Chicago bank, removed the cause to this court by writ of error.

No special finding of facts was made by the District Court of Woodward County, Oklahoma, at either trial, although both trials in that court were by the court without a jury. No special finding of facts in the case was made on either hearing by the Oklahoma Supreme Court. An opinion was given by the court, the first opinion ending with the reversal and remanding of the cause, and

the second opinion with an affirmance of the judgment of the trial court.

The so-called finding of facts which appears at pp. 2-3 of the Brief and Argument for plaintiff in error, was never made as a finding of facts, either by the Oklahoma Supreme Court or the District Court of Woodward County, Oklahoma.

The Statutes of the United States and the decisions of the courts bearing upon the question of jurisdiction in this case, may be found collected at pp. 459-460-461 of Vol. 4 of the Federal Statutes Annotated. The statute reads as follows:

> "That the appellate jurisdiction of the Supreme "Court of the United States over the judgments and "decrees of said Territorial courts in cases of trials "by jury shall be exercised by writ of error, and in "all other cases by appeal according to such rules "and regulations as to form and modes of proceeding "as the said Supreme Court have prescribed or may "hereafter prescribe:
>
> "Provided, that on appeal, instead of the evi- "dence at large, a statement of the facts of the case "in the nature of a special verdict, and also the rul- "ings of the court on the admission or rejection of "evidence when excepted to, shall be made and certi- "fied by the court below, and transmitted to the Su- "preme Court, together with the transcript of the "proceedings and judgment or decree; but no appel- "late proceedings in said Supreme Court, heretofore "taken upon any such judgment or decree, shall be "invalidated by reason of being instituted by writ "of error or by appeal."

This case having been tried by the court without a jury should have been brought here by appeal, and not by writ of error. The following decisions of this court are in point in support of this proposition:

> *Stringfellow* v. *Cain*, 99 U. S., 610; l. c., 612-613-614;

Davis v. *Fredericks*, 104 U. S., 618-619;
Neslin v. *Wells*, 104 U. S., 428;
Hecht v. *Boughton*, 105 U. S., 235;
United States v. *Railroad Co.*, 105 U. S., 263;
Gray v. *Howe*, 108 U. S., 12;
Story v. *Black*, 119 U. S., 235;
Idaho Land Co. v. *Bradbury*, 132 U. S., 509; l. c., 513;
Gregory Mining Co. v. *Starr*, 141 U. S., 222;
San Pedro Co. v. *United States*, 146 U. S., 130;
Mining Co. v. *Machine Co.*, 151 U. S., 447;
Bonnifield v. *Price*, 154 U. S., 672;
Hawes v. *Mining Co.*, 160 U. S., 303;
Grayson v. *Lynch*, 163 U. S., 468;
Young v. *Amy*, 171 U. S., 179;
Marshall v. *Burtis*, 172 U. S., 630;
Cohn v. *Daly*, 174 U. S., 539.

Upon the second point as to the jurisdiction of this court that this court cannot consider the case because there is no finding of facts in the nature of a special verdict in the case, either by the Supreme Court of Oklahoma or the District Court of Woodward County, Oklahoma, we call attention to the pointed language in the opinion of this court, delivered by Chief Justice Waite, in the case of *Bonnifield* v. *Price*, 154 U. S., 672.

In that case Chief Justice Waite said:

"This is a writ of error to bring here for review "a judgment of the Supreme Court of the Territory "of Wyoming in a case where the trial was not by "jury. It is therefore dismissed on the authority "of *Hecht* v. *Boughton*, 105 U. S., 235, decided at "the present term. The appropriate remedy in this "case, under the act of April 7, 1874, ch. 80, Sup. "Rev. Stat., 12, was by appeal.

"But if we could treat this writ of error as an "appeal, the case is in no condition for an examina- "tion here, because there is no such statement of

"facts in the record as the law requires. The bill "of exceptions taken in the District Court contains "all the evidence, and as the Supreme Court directed "a judgment in favor of the defendant, it is clear "that court passed on other questions than such as "were presented on the rulings in the admission of "evidence. Under these circumstances a statement "of facts such as the statute requires is necessary "to enable us to re-examine the case."

As we have seen, in the case at bar, no special finding of facts was made at either trial by the District Court of Woodward County, Oklahoma, or by the Supreme Court of Oklahoma, at either hearing. The alleged finding of facts set out at pp. 2-3 of the brief and argument for plaintiff in error in this court is a mere culling together of some of the facts contained in the opinion of the Oklahoma Supreme Court on the first hearing of the cause (p. 141, printed Record).

It is the well settled law of the Federal appellate tribunals, both supreme and circuit courts of appeal, that any statement of facts in an opinion by the court cannot be taken or considered as a finding of facts in the nature of a special verdict.

Dickinson v. *Bank,* 16 Wall, 250; l. c., 252-256;
Lahner v. *Dickson,* 148 U. S., 71; l. c., 74;
Saltonstall v. *Birtwell,* 150 U. S., 417;
Stone v. *United States,* 164 U. S., 380;
Kentucky Life Insurance Co. v. *Hamilton,* 63 Fed. Rep., 93; 11 C. C. A., 42;
Minchen v. *Hart,* 72 Fed. Rep., 294; 18 C. C. A., 570;
National Masonic Ass'n v. *Sparks,* 83 Fed. Rep., 225; 28 C. C. A., 399; l. c., 403;
Mutual Reserve Ass'n v. *Du Bois,* 85 Fed. Rep., 586; 29 C. C. A., 354.

The alleged finding of facts set out at pp. 2-3 of the brief and argument for the plaintiff in error does not contain all of the facts referred to by the court in its opinion. Thus, at p. 142 of the printed Record, it appears that the Oklahoma Supreme Court in its opinion says:

> "It is insisted that these notes were given as renewal of the second set of notes taken by the Siegel-Sanders Commission Company, but perhaps that is not material under our view of the law."

And the facts in regard to the renewal of the notes are not stated in the opinion. The Oklahoma Supreme Court decided the law of the case to be with the Geneseo bank, irrespective of the question whether the Chicago bank in its purchase of the notes and mortgage relied upon by it was an innocent subsequent *bona fide* purchaser for value without notice, and the facts relied upon in that part of this statement of facts which relates to the merits and which pertains to the issue submitted in all of the lower courts, whether the Chicago bank is a subsequent *bona fide* purchaser for value, are not set out in the opinion or referred to in any other way except by the above quoted remark.

As already stated, the Supreme Court of Oklahoma decided the law to be with the Geneseo bank, irrespective of the facts of this case showing that the Chicago bank was not an innocent subsequent purchaser for value without notice. It will be seen from that part of this statement which relates to the merits, that the question whether the Chicago bank was in fact, upon the conceded facts of this case, a subsequent *bona fide* purchaser for value without notice, was not responded to by the Supreme Court of Oklahoma in any way, either by a reference to the facts or by the question of law considered in its opinion. Of course, it goes without saying that the Okla-

homa Supreme Court in delivering its opinion never supposed that it was making a finding of facts in the nature of a special verdict in the case. The opinions of the Supreme Court of Oklahoma, in cases decided by it, are written and filed under Sections 4456-4457, p. 859 of the Statutes of Oklahoma for 1893. Those two sections read as follows:

> 4456. It shall be the duty of the judges of the Supreme Court to prepare, and file with the papers in each case, full notes of the opinion of the court upon the questions of law arising in the case, within sixty days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor, except for copies thereof ordered by a party; and no mandate shall be sent to the court below, until the opinion provided for by this section has been filed.
>
> 4457. A syllabus of the points of law decided in any case in the Supreme Court shall be stated, in writing, by the judge delivering the opinion of the court, and filed with the papers of the case, which shall be the points of law arising from the facts in the case that have been determined by the court; and the syllabus shall be submitted to the judges concurring therein, for revisal before filing thereof, and it shall be filed with the papers, without alteration, unless by consent of the judges concurring therein; and a copy of such syllabus shall, in all cases, be sent to the court below, by the clerk of the Supreme Court, with the mandate provided for by Section five hundred and seventy-seven of this act.

These sections do not require the opinion to contain any facts or finding of facts, or even a statement of the facts of the case to be embodied in the opinion of the court. Again, the alleged finding of facts at pp. 2-3 of the brief or plaintiff in error does not refer to all of the facts which are mentioned in the opinion of the court. There are different facts mentioned at different points

in the opinion of the Oklahoma Supreme Court, in a sort of desultory and fragmentary, but entirely proper manner, which are not contained in the alleged finding of facts at pp. 2-3 of the argument and brief of plaintiff in error. Thus, at the top of p. 143 of the printed Record appears the following in said opinion:

> "The Bank never appointed the Siegel-Sanders "Commission Company its agent to collect this "money, nor did that Company have any express "or implied authority to do so or to release the "chattel mortgage which secured the same."

This statement of fact is not embodied in the alleged finding of facts in the brief of counsel for the Chicago Bank. Again, one of the points decided by the Oklahoma Supreme Court was, that the release relied upon by the Chicago Bank, not being acknowledged, was not properly recorded and was not valid or binding as against the Geneseo Bank. However, neither that release nor the fact that it was not acknowledged appears in the alleged finding of facts at pp. 2-3 of the brief and argument of the plaintiff in error. That release and the fact that it was not acknowledged, however, appears in another part of the opinion of the Oklahoma Supreme Court to be found at p. 148 of the printed Record.

Again at p. 142 of the printed Record appears the following in the opinion of the Oklahoma Supreme Court:

> "A number of questions are argued in the "briefs, and while we will not discuss, we have con- "sidered them all and will discuss those which we "think are controlling."

It thus appears that the opinion of the Supreme Court does not respond to all of the issues in the case, either of law or fact, and, of course, the court at different points in its opinion simply referred to those facts which had relation to the law questions discussed by it; but the

facts which at different points in the opinion are referred to, are nowhere stated by the court with any intention that they should be considered as a special finding of facts by the court in the nature of a special verdict.

It was the duty, we submit, of counsel for the plaintiff in error in this case to have had the District Court on the trial of the case, especially at the second trial, make a finding of facts in the nature of a special verdict. This could have been done under Section 4180 of the Code of Civil Procedure, p. 812, of the Territory of Oklahoma for 1893, which section reads as follows:

> "Upon the trial of questions of fact by the "court, it shall not be necessary for the court to "state its findings, except generally, for the plaintiff "or defendant, unless one of the parties request it, "with the view of excepting to the decision of the "court upon the questions of law involved in the "trial; in which case the court shall state, in writing, "the conclusions of fact found, separately from the "conclusions of law."

This is the practice which is to be found in all, or nearly all, of the code states and fully enabled the plaintiff in error to obtain the finding of facts necessary to give this court jurisdiction on an appeal. This court has more than once held that where a finding of facts such as the above statute contemplates is made by the Territorial trial court and that finding of facts is passed upon by the Territorial Supreme Court, such finding of facts by the trial court becomes the finding of facts by the Supreme Court for the purpose of jurisdiction by the Supreme Court of the United States on an appeal.

We submit, that it was the duty of the plaintiff in error in this case to have had a finding of facts made by the trial court under this statute, especially so, when it is considered that after the first hearing in the Oklahoma Supreme Court, the re-trial in the District Court at the

second trial and the re-hearing on the second hearing in the Oklahoma Supreme Court were all had *pro forma*, preparatory to and to perfect an appeal to this court. Therefore, we submit, that it was the duty of counsel for plaintiffs in error in this case to have had prepared and made by either the District Court of Woodward County, Oklahoma, on the second trial, or by the Supreme Court of Oklahoma on the second hearing, a finding of facts, since that was absolutely essential to give this court jurisdiction on an appeal.

The opinion of the Supreme Court of Oklahoma, from which the plaintiff in error culls the facts alleged to constitute the findings of fact, was delivered by the court on the first hearing. But the writ of error in this case does not bring before this Court the judgment or opinion of the Oklahoma Supreme Court delivered on the first hearing. The judgment and opinion of the Oklahoma Supreme Court on the first hearing reversed and remanded the cause, opened up the case for a re-trial, and counsel for the plaintiff in error, conceding that that was not a final judgment which could be brought before this court by writ of error or appeal, had the case sent back to the state court so that it could be finally disposed of for the purpose of an appeal to this court. The appeal to this court is not made from the first decision and opinion of the Oklahoma Supreme Court, but from its last judgment and opinion.

Passing now from these jurisdictional points, we proceed to state the facts from the evidence in the record in the case, for the consideration of this court, if this court shall be of the opinion that these points as to the jurisdiction of the court are not well taken.

The action was brought in the trial court by the said National Live Stock Bank of Chicago, as plaintiff, against said First National Bank of Geneseo, Illinois, as defendant.

For convenience we will speak of these parties as they were characterized in the trial court. We will describe the plaintiff in error here, and speak of it in this record as the plaintiff Chicago Bank, and this may be understood as referring in each instance to the National Live Stock Bank of Chicago; and we will describe the First National Bank of Geneseo, Illinois, which is the defendant in error here and the defendant below, as the defendant Geneseo Bank.

The action was in replevin for five hundred head of cattle, valued at the sum of twenty-four dollars each.

The claim of the plaintiff, Chicago Bank, is under and by virtue of two promissory notes, given and dated on April 17th, 1901, and each for the sum of seventy-six hundred ninety-four and 77-100 ($7,694.77) dollars, payable October 27th, 1901, both executed by W. B. Grimes, Jr., and payable to the order of Siegel-Sanders Live Stock Commission Company, and a chattel mortgage which was given by the mortgagor, W. B. Grimes, Jr., to said Siegel-Sanders Live Stock Commission Company, on said 500 head of cattle, to secure the payment of said notes, and which notes and mortgage were afterwards assigned to said plaintiff, Chicago Bank. The petition may be found from page 5 to page 8 of the printed Record. Copies of said notes, as exhibits to said petition, may be found at pages 8 and 9 of the printed Record. A copy of said chattel mortgage given by Grimes to said commission company as security for said notes, which was filed as an exhibit to said petition, may be found from page 9 to page 13 of the printed Record. With said petition, plaintiff, Chicago Bank, filed a replevin bond and affidavit in replevin (pp. 15 to 17 of the printed Record).

The suit was commenced on May 28th, 1901, and on the same day the clerk issued an order of delivery (p.

17, Record). This order of delivery was served by taking the cattle from the possession of the defendant, Geneseo Bank, and delivering the same to the plaintiff, Chicago Bank (p. 18, Record).

Afterwards, pursuant to a stipulation of the parties, the plaintiff, Chicago Bank, filed an amended petition (pp. 20 to 23, Record). The amended petition set out the same notes and mortgage hereinbefore referred to, that were stated in the original petition. Both the original and amended petition averred that the cattle conveyed by said mortgage were in Clark County, Kansas; that the mortgagor, W. B. Grimes, was a resident and citizen of Clark County, Kansas, and that said chattel mortgage was recorded with the register of deeds of said Clark County, Kansas, under the laws of said State of Kansas, which are set out and pleaded in said amended petition. The amended petition, the same as the original petition, concluded with a prayer for judgment for possession of the personal property sued for.

The answer of the defendant, Geneseo Bank, extends from page 23 to page 26 of the printed Record. The answer denied all the averments of the amended petition, except that the plaintiff and defendant Banks were national banking corporations, duly organized under the laws of the United States, which was admitted. The answer of the defendant, Geneseo Bank, then proceeded to aver the execution and delivery by said W. B. Grimes, Jr., of a promissory note to said Siegel-Sanders Live Stock Commission Company, and payable to its order, for the sum of eleven thousand one hundred eleven and 23-100 ($11,111.23) dollars, dated June 27th, 1900, and payable November 1st, 1900, with interest at eight per cent per annum, and that said Grimes for the purpose of securing the payment of said note, executed and delivered to said Siegel-Sanders Live Stock Commission

Company, his certain chattel mortgage dated June 27, 1900, whereby he conveyed unto said Siegel-Sanders Live Stock Commission Company five hundred and twenty-six (526) head of cattle, which were located in Clark County, Kansas, and that said Grimes was a resident of said county, and that on July 12th, 1900, said mortgage was duly recorded in the office of the register of deeds of said Clark County, Kansas. Certain statutes of the State of Kansas, were also copied and pleaded in said answer.

It was further averred in said answer that said last note and mortgage, before the maturity of said last note, were duly sold, endorsed by endorsement on the back of said note, and delivered to said defendant Geneseo Bank for a valuable consideration paid by said defendant, Geneseo Bank, to said Siegel-Sanders Live Stock Commission Company, and that ever since said endorsement, sale and delivery of said note and mortgage, said defendant, Geneseo Bank, had been and still was the owner and holder of said last note and mortgage.

Said answer pleaded the terms and conditions of said mortgage and averred that it was provided in said chattel mortgage so held by defendant, Geneseo Bank, that if default should be made in the payment of said note when the same became due and payable, or that in case of a sale or disposal or attempt to sell or dispose of said cattle, conveyed by said mortgage, or in case of a removal or attempt to remove the same from the place where the same was located, or if from any other cause the security should become inadequate, or said party holding said mortgage should deem itself insecure at any time before the indebtedness evidenced by said note should be fully paid, then it should be lawful for the said "Party of the second part in said mortgage described, to-wit., the Siegel-Sanders Live Stock Commission Com-

pany, its successors or assigns," to enter upon the premises and to take possession of the cattle, and proceed to sell the same.

It was further averred in said answer that the conditions of said mortgage were broken, and that default had been made in payment of said last note and that said cattle had been removed from the premises in Clark County, Kansas, where they were situated when the mortgage was made, and that the defendant, Geneseo Bank, deemed itself insecure, and was therefore entitled to the possession of said cattle under said mortgage. Said answer concluded with a prayer for the possession of said property.

The said last note given for the sum of $11,111.23, being payable to order, is negotiable and together with the endorsement thereon, by which title thereto was transferred to said defendant, Geneseo Bank, may be found at page 27 of the printed Record.

A copy of the mortgage pleaded in defendant's answer may be found from page 27 to page 30 of the Record.

To the new matter pleaded in defendant's answer the plaintiff, Chicago Bank, filed a reply (pp. 31 and 32, printed Record). By said reply said plaintiff, Chicago Bank, denied each and every allegation in said answer not inconsistent with plaintiff's amended petition, and not hereinafter expressly admitted.

Said reply further alleged that the note mentioned in defendant's answer was paid and fully discharged, said note being then the property of the said Siegel-Sanders Live Stock Commission Company and due by payment on November 24, 1900, of said note, to said Siegel-Sanders Live Stock Commission Company, by said W. B. Grimes, the maker thereof, by the execution and delivery of another note for about the sum of fourteen

thousand dollars, and that on said November 24, 1900, said Siegel-Sanders Live Stock Commission Company, by its president, executed and delivered its certain release, whereby the said mortgage so held by said defendant, Geneseo Bank, was discharged and payment thereof acknowledged, and that thereafter, on November 27th, 1900, said release so executed by said Siegel-Sanders Live Stock Commission Company was filed in the office of the register of deeds of said Clark County, Kansas, and that said register of deeds thereupon entered said release and satisfied said chattel mortgage so held by said defendant, Geneseo Bank, upon the chattel mortgage records of said county, and thereby released, cancelled and finally discharged said chattel mortgage of record, and a copy of said release is filed with said reply.

On these pleadings the case came on for trial in the District Court of Woodward County, Oklahoma, without the intervention of a jury. The evidence in the case continues from page 33 to page 131 of the Record.

A stipulation signed by the counsel of the parties (p. 35, Record), was read to the court, which provides as follows:

> "That in order to avoid the expense of taking evidence to prove the law of the State of Kansas relative to this case, each party may have the right to use the Statutes and Session Laws of Kansas and the Supreme Court Reports and the appeal Reports of said state, whether the same have been set up in the pleadings or not, without objection as to the point whether or not the law has been pleaded by either plaintiffs or defendants."

Another stipulation was read to the court (p. 34, Record), by which said last stipulation it was agreed and stipulated that there were in existence, at the time of the order of delivery in this suit, to-wit., on May 28th, 1901, covered by the chattel mortgage claimed to be owned by

said defendant, Geneseo Bank, and bearing date June 27th, 1900, as well as by the chattel mortgage claimed to be owned by the plaintiff, Chicago Bank, bearing date April 17th, 1901, both of which mortgages were executed by W. B. Grimes, Jr., as mortgagor, to Siegel-Sanders Live Stock Commission Company, five hundred head of steers; that for the purposes of this trial, the value of said five hundred head of steers should be taken at twenty-four dollars ($24.00) per head; that while of said five hundred head of steers, only three hundred and seventy-four (374) head were taken on the order of delivery herein, the title to the remaining one hundred twenty-six (126) head should abide by and be controlled by the final determination of this suit, and that any judgment entered in this case should include said one hundred twenty-six head of cattle, as well as said three hundred seventy-four head so taken on said order of delivery, and a trial by a jury was waived by said last stipulation. The aggregate value of said five hundred head of cattle thus included in this suit, at the rate of twenty-four ($24.00) dollars per head, which was the value per head fixed by said stipulation, is twelve thousand ($12,000.00) dollars.

Counsel of the plaintiff and defendant Banks made statements of their cases, which statements are contained in the printed Record (pp. 37 to 52).

On behalf of plaintiff Chicago Bank, its counsel stated that on June 27th, 1900, said Grimes, who resided at Ashland, Clark County, Kansas, made a certain promissory note for eleven thousand one hundred and eleven dollars and some cents, payable six months after date, secured by a chattel mortgage on 526 head of steers, being in Clark County, Kansas, and said mortgage being executed and filed for record in Clark County, Kansas, on July 12th, 1900, and that said mortgage was made to

Siegel-Sanders Live Stock Commission Company, of Kansas City; that afterwards, on November 24th, 1900, Siegel-Sanders Live Stock Commission Company executed a release of that mortgage and forwarded it to the register of deeds at Ashland, Clark County, Kansas, for record; that on October 24th, 1900, said Grimes executed another mortgage on the same cattle and some more in addition thereto, making in all six hundred thirty-three (633) head of cattle; that said release was filed for record in the office of the register of deeds of Clark County, Kansas, on November 27th, 1900; that said last mortgage was filed for record in the office of the register of deeds of Clark County, Kansas, on October 27th, 1900; that said last mortgage secured two (2) promissory notes, due six months after date, or on April 17th, 1901, one of those notes being for seven thousand ($7,000) dollars and the other being for seven thousand thirty-three ($7,033) dollars and some cents, and that afterwards, on April 17th, 1901, Grimes executed a third chattel mortgage to secure two (2) notes six months after date, or on October 17th, 1901, which last two notes aggregated a little over fifteen thousand ($15,000) dollars; that on May 21st, 1901, learning that the defendant, Geneseo Bank, had taken possession of the cattle covered by said mortgage, made in June, 1900, demand was made for the surrender and possession of said cattle, which defendant, Geneseo Bank, refused to obey, and that the cattle had been removed from Ashland, Kansas, to Oklahoma Territory and to said Woodward County.

It was further stated by plaintiff, Chicago Bank's counsel, in his said statement, that the Chicago Cattle Loan Company was a corporation, organized under the laws of West Virginia, having its offices and principal place of business at Chicago, and that the offices of the Chicago Cattle Loan Company are also the offices of the

plaintiff, Chicago Bank; that in February, 1901, the Chicago Cattle Loan Company owned said mortgage and notes made by said Grimes on said cattle, in October, 1900, and being such owner of said last mortgage, said Chicago Cattle Loan Company, together with the plaintiff, Chicago Bank, sent a representative to Ashland, Kansas, to examine the records of said Clark County, Kansas, and that the records disclosed, in February, 1901, that there were no unreleased mortgages against said cattle, and that the said mortgage so made in October, 1900, and owned by said Chicago Cattle Loan Company, was a first lien upon the said cattle, and that when said last mortgage, which was made in October, 1900, matured in April, 1901, the mortgage, under which said plaintiff, Chicago Bank, now claims, was given as a renewal of that mortgage, so made in October, 1900.

It was further stated by counsel for plaintiff, Chicago Bank, in his said statement, that both the defendant, Geneseo Bank, and the plaintiff, Chicago Bank, took their resepctive papers in good faith and that they both relied upon the fact that they were holding first mortgages.

In the statement of the defendant, Geneseo Bank's counsel, it was stated that since the defendant Geneseo Bank's mortgage was prior to the mortgage of the plaintiff, Chicago Bank, if any satisfaction of the defendant, Geneseo Bank's mortgage had been made, it was by the Siegel-Sanders Live Stock Commission Company, without the authority or consent of the defendant, Geneseo Bank, and that the mortgage of the defendant, Geneseo Bank, being unpaid and unsatisfied, said Siegel-Sanders Live Stock Commission Company had no authority to release said last chattel mortgage.

It was agreed by both parties that both mortgages held by both plaintiff and defendant Banks were prop-

erly executed and properly recorded, according to the laws of Kansas (p. 42, Record).

Said agreement was in substance as follows:

That on June 27th, 1900, W. B. Grimes, Jr., made a mortgage bearing date of the date last aforesaid, to the Siegel-Sanders Live Stock Commission Company, on 526 head of cattle, securing one promissory note for $11,111.23, dated June 27th, 1900, and payable November 1st, 1900, said mortgage being acknowledged before M. G. Stevenson, on July 5th, 1900, and filed for record in the office of the register of deeds in Clark County, Kansas, on the 12th day of July, 1900, and duly recorded in Book 6, deed record at page 27 theerof, that said chattel mortgage was duly stamped with the proper amount of revenue stamps.

That the mortgage held by the plaintiff, Chicago Bank, was executed by W. B. Grimes, Jr., in Clark County, Kansas, dated April 17th, 1901, and securing two promissory notes, each for the sum of $7,694.77, of even date with said mortgage, payable October 27th, 1901, to the "Siegel-Sanders Live Stock Company," executed by W. B. Grimes, Jr., as mortgagor, to the Siegel-Sanders Live Stock Commission Company, as mortgagee; that said last mortgage was filed for record in the office of the register of deeds of Clark County, on April 25th, 1901, and duly recorded in book 6, at page 132; that said last mortgage was duly acknowledged by said W. B. Grimes, Jr., before M. G. Stevenson, a notary public of Clark County, Kansas, on April 19th, 1901.

It was further agreed that both of said mortgages were executed, delivered and recorded in compliance with the laws of the State of Kansas then in force; that at the date of the execution of said mortgages, and each of them, the cattle described in said mortgages, and each of them, were then in Clark County, Kansas, and that W. B. Grimes, Jr., the mortgagor in both of said mortgages, at the time of the execution and delivery of

said mortgages, and each of them, was a resident of Clark County, Kansas, being a resident of Ashland in said county, and that said Grimes was the owner of said cattle at the time of the execution of each of said chattel mortgages; that said defendant, Geneseo Bank, claimed under said mortgage, dated June 27th, 1900, and that said plaintiff, Chicago Bank, claimed under said mortgage, dated April 17th, 1901.

It was further stipulated and agreed by the parties that said chattel mortgages last referred to were the same chattel mortgages, true copies of which are attached to the original petition of the plaintiff, Chicago Bank, and to the answer of the defendant, Geneseo Bank. That said amended petition refers to the copies attached to the original petition and makes said copies a part of the amended petition, and that said amended answer refers to the chattel mortgage attached to the original answer.

It was further stipulated that said note, given for the sum of $11,111.23, dated June 27th, 1900, and due November 1st, 1900, which is held by said defendant, Geneseo Bank, and which is secured by said chattel mortgage dated June 27th, 1900, was and still is unpaid and due, and that at the time of the commencement of this suit the said chattel mortgage, bearing date June 27th, 1900, held by said defendant, Geneseo Bank, was less than one year old, and that according to the laws of the State of Kansas a chattel mortgage remains a lien upon the property therein described for one year from the date of the filing thereof in the office of the register of deeds, unless theretofore properly released (p. 43, Record).

It was also agreed by the parties that the said two promissory notes, dated April 17th, 1901, and due October 27th, 1901, and each for the sum of $7,694.70, and each being signed by W. B. Grimes, Jr., and payable to the order of Siegel-Sanders Live Stock Commission Com-

pany, were, at the date of the commencement of this suit, and still are due and unpaid (p. 43, Record).

It was further stipulated by the parties that said note for $11,111.23, held by the defendant, Geneseo Bank, was and had been, since about the month of July, 1900, held and owned by said defendant, Geneseo Bank, as well as the said chattel mortgage bearing date June 27th, 1900, and that said last note and chattel mortgage had been in the possession of said defendant, Geneseo Bank, continuously since the month of July, 1900, (p. 44, printed Record).

It was further stipulated by the parties that said two notes, bearing date April 17th, 1901, and due October 27th, 1901, each for the sum of $7,694.77, being the notes secured by the chattel mortgage, dated April 17th, 1901, and recorded April 25th, 1901, were and have been, since the date of April 17th, 1901, held and owned by plaintiff, Chicago Bank, and that said chattel mortgage securing said notes has, since the said 27th day of April, 1901, been continuously held and owned by said plaintiff, Chicago Bank, and that at the time of the commencement of this suit nothing had been paid on the said notes, or either of them, and it was further stipulated that neither the note owned by the defendant, Geneseo Bank, nor the notes owned by the plaintiff, Chicago Bank, have, nor has any part of them, been paid.

At this point the mortgage held by plaintiff, Chicago Bank, together with the acknowledgement and the certificate of the register of deeds recording the same, were offered and read in evidence (pp. 44 to 48 of the Record).

Said last mortgage is dated April 17th, 1901, is signed by W. B. Grimes, Jr., and secures said two notes, given each for the sum of $7,694.77. It was acknowledged by Grimes on April 19th, 1901, before a notary

public, and the certificate of the register of deds shows that it was recorded on April 25th, 1901.

Said two notes, dated April 17, 1901, for $7,694.77 each were also offered and read in evidence (p. 48, Record). Said two notes bear on the back thereof an endorsement as follows:

> "For value received we hereby assign this note to the National Live Stock Bank of Chicago, or order, and waive demand, notice and protest of same, and guarantee payment thereof at maturity."
>
> Signed by the Siegel-Sanders Live Stock Commission Company.

It was further stipulated and agreed by the parties that the cattle described in these mortgages, held by the plaintiff and defendant Banks, were removed from Clark County, Kansas, to Woodward County, Oklahoma, between April 25th, 1901, and May 1st, 1901, without the knowledge or consent of either the plaintiff or defendant Banks, and without the knowledge or consent of the Siegel-Sanders Live Stock Commission Company, and that on or about May 19th or 20th, 1901, the defendant, Geneseo Bank, by its representative, demanded from said Grimes, who was in possession of said cattle, that he turn over to its representative said cattle mentioned in said mortgage held by said Geneseo Bank, and that pursuant to said demand, said Grimes, on May 19th or 20th, 1901, did turn over the possession of said cattle, or so much thereof as could be identified, to said defendant, Geneseo Bank, or its representative or agent.

It was further stipulated and agreed by the parties that prior to the commencement of this suit the plaintiff, Chicago Bank, demanded from the defendant, Geneseo Bank, which was in the possession of the cattle mentioned and described in the mortgages of both the plaintiff and defendant, that said defendant, Geneseo Bank,

turn over to the plaintiff, Chicago Bank, the possession of the cattle therein metnioned and described, it being further stipulated and agreed that the cattle mentioned and describd in the chattel mortgage so held by defendant, Geneseo Bank, and described in the mortgage held by the plaintiff, Chicago Bank, were one and the same, and that said cattle are also the same cattle as the ones which were taken on the order of delivery in this suit.

It was further stipulated and agreed that said defendant, Geneseo Bank, prior to the commencement of this suit, refused to surrender the possession of said cattle to the plaintiff, Chicago Bank, upon said demand so made. That the number of cattle in the mortgage of the defendant, Geneseo Bank, was 526, and the number in the mortgage owned by the plaintiff, Chicago Bank, was 606, but that the 526 head secured and described in the mortgage held by the defendant, Geneseo Bank, are included in the 606 head described in the mortgage held by the plaintiff, Chicago Bank.

It was further stipulated and agreed that said Grimes acquired the difference in the number of cattle covered by the two mortgages, that is to say, eighty head of cattle, between the date of the execution of the mortgage held by the defendant, Geneseo Bank, to-wit., June 27th, 1900, and the date of the mortgage held by the plaintiff, Chicago Bank, which was April 17th, 1901 (p. 50, Record).

The note given June 27th, 1900, by W. B. Grimes, Jr., payable November 1st, 1900, to the order of Siegel-Sanders Live Stock Commission Company, for the sum of $11,111.23, and which, as appears above, was transferred to and became the property of the defendant, Geneseo Bank, was offered in evidence, and is copied in full at pages 108 and 109 of the Record. Said note is payable to the order of Siegel-Sanders Live Stock Commission Company and is for the payment of the definite sum of

$11,111.23. There is no controversy that said note was and is a negotiable promissory note. It is the same note pleaded by the defendant, Geneseo Bank, in its answer to the amended petition. The endorsement, assignment and transfer of that note and guaranty of its payment by Siegel-Sanders Live Ctock Commission Company may also be found copied with the note at page 148 of the Record.

The chattel mortgage dated June 27, 1900, for the cattle in controversy, which was given to secure said note for $11,111.23, and which is pleaded by the defendant, Geneseo Bank, in its answer, may also be found in the evidence, and is copied in full, from page 109 to page 112 of the printed Record.

With said copy of said mortgage and the acknowledgment thereof also appears a certificate by the register of deeds of Clark County, Kansas, of its filing in his office on July 12th, 1900.

Although this mortgage held by the defendant, Geneseo Bank, and the note which it was given to secure, above referred to, were and are admitted to be valid instruments creating a lien on the cattle in controversy, and although the note and mortgage so held by the defendant, Geneseo Bank, as agreed by the parties as above stated, have never been paid, but remain wholly due and unpaid, it was the contention in the court below and is the contention here, that said note and mortgage for $11,111.23, although owned and held continuously since July, 1900, by the defendant, Geneseo Bank, as agreed by the parties as above stated, and although, as above stated, it is agreed that said note and mortgage were never paid but remain wholly due, was discharged by the unauthorized release four months after defendant bought them, which was given by the Siegel-Sanders Live Stock Commission Company and placed on record November 27th, 1900.

Said release was offered in evidence by the plaintiff, Chicago Bank, and admitted by the court. Said release appears at pages 62 and 63 of the Record. It does not recite the payment of the note. Said release is dated November 24th, 1900, and purports to have been signed by Siegel-Sanders Live Stock Commission Compay, by Frank Siegel, president, with the seal of said company affixed, and was filed for record with the register of deeds of Clark County, Kansas, on November 27th, 1900.

The contention in the court below was, and the contention here will be over the effect of this release.

To the admission in evidence of said release by the trial court, objections in various forms were made and exceptions were saved by the defendant, Geneseo Bank. Those objections and exceptions may be found at pages 50, 51, 52, 61, 62, 64, 71 and other pages of the Record.

It was not denied in the trial Court by the plaintiff, Chicago Bank, nor by its counsel, that said release was invalid as to the defendant, Geneseo Bank, and it was proven by the plaintiff, Chicago Bank, through its counsel, by an attorney at law of the State of Kansas, that said release was invalid as to the holder of a negotiable promissory note, such as the one that is held by the defendant, Geneseo Bank, in this case. (P. 106, printed Record).

In the trial Court, plaintiff, Chicago Bank, by its attorney, put on the stand one Thornton W. Sargent, an attorney at law of Wichita, Kansas, and attempted to prove the law of Kansas on the subject of chattel mortgages in that state. Since the law of Kansas on the subject of releasing chattel mortgages is regulated and fixed by statute, Mr. Sargent was not permitted by the trial Court to give testimony as to what the law was, but, at the instance of the plaintiff, Chicago Bank, Mr. Sargent

was permitted to state that the release of a chattel mortgage would not be good as against the assignee of a negotiable promissory note secured by said mortgage (p. 106, printed Record). And it was practically conceded in the trial Court by the plaintiff, Chicago Bank, and its attorneys, that the release in this case by Siegel-Sanders Live Stock Commission Company, of defendant, Geneseo Bank's note and mortgage, was invalid as to the defendant, Geneseo Bank, but that it became valid as to plaintiff, Chicago Bank, because of the fact, claimed by the plaintiff, Chicago Bank, that said plaintiff, Chicago Bank, was an innocent purchaser for value, without notice of the holding by said defendant, Geneseo Bank, of its said note and mortgage.

The case in the Court below on the first trial was made to turn upon this proposition, that the plaintiff, Chicago Bank, was an innocent purchaser for value, without notice of defendant's holding of its note and mortgage, and the decision and judgment of the Court below, in favor of the plaintiff, Chicago Bank, on the first trial, was based upon the holding by the Court that the plaintiff, Chicago Bank, was such innocent purchaser for value, without notice.

The evidence bearing upon this question of plaintiff, Chicago Bank, being an innocent purchaser for value, without notice, is as follows:

On October 17th, 1900, said W. B. Grimes, Jr., executed and delivered to Siegel-Sanders Live Stock Commission Company two notes and a chattel mortgage, in attempted renewal of said note and mortgage held by the defendant, Geneseo Bank. This renewal mortgage is referred to in the opening statment of facts by counsel of plaintiff, Chicago Bank, at page 39 of the printed Record, in the following language, to-wit:

> "On the 24th day of October, 1900, the mort-
> "gagor in the first mortgage, W. B. Grimes, exe-

"cuted another mortgage upon the same cattle, and "some more in addition thereto, making in all 633 "head of cattle, being identified in the several marks "of brand on the left hip. * * * *

"The mortgage to which I have last referred was "filed for record in the office of the register of deeds "of Clark county, Kansas, on the 27th day of Octo- "ber, 1900. The mortgage last referred to secured "two promissory notes due 6 months after date or "April 17th, 1901, one of those notes being for $7,- "000.00 and the other for $7,033 and some cents. "Afterwards, and on the 17th day of April, 1901, "Grimes executed a third chattel mortgage to se- "cure two notes due six months after date or on "October 17th, 1901. The two notes aggregated a "little over $15,000.00."

This mortgage which was made in October, 1900, is referred to in the testimony of the witnesses and in the questions of the plaintiff, Chicago Bank's counsel, at pages 60, 85, 86-87 of the printed Record.

These renewal notes and the chattel mortgage given by Grimes in October, 1900, were sold by Siegel-Sanders Live Stock Commission Company to the Chicago Cattle Loan Company. The Chicago Cattle Loan Company had its offices in Chicago in the same offices of the plaintiff, Chicago Bank, and the officers of said Chicago Cattle Loan Company were the same as the officers of the plaintiff, Chicago Bank. The testimony shows that the Chicago Cattle Loan Company was practically an annex of the plaintiff, Chicago Bank. See pages 40, 83, 86-87-88 and 89 to 94 of the printed Record.

Thus at page 40 of the Record, plaintiff, Chicago Bank's counsel, in his opening statement, used the following language:

> "I might say by way of history, and it will also come out in the evidence, that the Chicago Cattle Loan Company is a corporation, organized

under the laws of West Virginia, having its office and place of business at Chicago, and that the offices of the Chicago Cattle Loan Company are also the offices of the National Live Stock Bank of Chicago, the plaintiff. That in the month of February, 1901, the Chicago Cattle Loan Company and the plaintiff bank, the Cattle Loan Company at that time owning the mortgage which we claim was and is a mortgage on the cattle, sent a representative to Ashland, Kansas, to examine the records, and the records disclosed at that time that there were no unreleased mortgages against the property, and that the mortgage then owned by the Chicago Cattle Loan Company was a first lien upon the property, and that when this mortgage matured, it was in April, 1901, the mortgage under which we now claim was a renewal of that mortgage and the difference in the amount of the mortgage. The cattle company mortgage is on this side of fourteen thousand dollars and some cents and the present mortgage is for a little upwards of fifteen thousand dollars, being accounted for in addition to the loan, in the feeding expenses and interest."

Again, at page 83 of the Record, Mr. C. H. True, who is a cattle inspector of both the Chicago Cattle Loan Company and the plaintiff, Chicago Bank, testified as follows:

Q. Were you in the services of the Chicago Cattle Loan Company and the National Live Stock Bank in the month of February, 1901? A. Yes, sir.

Q. And continuously since that time? A. Yes, sir.

Q. What was your duty and business as inspector? A. My duty was to attend to the field work; make inspections of loans for them.

Q. What do you mean by inspecting loans? A. I received from the Bank or Cattle Loan Company—I received from the National Live Stock Bank or the Chicago Cattle Loan Company, for

both of whom I worked, slips or orders, giving the number of their loan, the amount of money, the name of the mortgagor and mortgagee and a description of the property mortgaged.

Q. State whether or not you ever visited Ashland, Kansas, with reference to the loan of W. B. Grimes? A. I did, sir.

Q. State when, or about, was that visit? A. I reached Ashland on the 21st of February and remained there until the 25th of February, 1901.

Again, at pages 86 and 87 of the Record, the counsel of the plaintiff, Chicago Bank, in response to a question by the Court, in speaking of the mortgage held by the defendant, Geneseo Bank, which was given June 27th, 1900, used the following language:

"Subsequent to that, on October 17th, there was a new mortgage made, which the cattle loan company had, for $14,000, and that was the mortgage which Mr. True went there at that time to inspect, and subsequently, on the 17th day of April, 1901, our mortgage was executed, under which we claim in this suit."

By the Court: "I thought Mr. True was representing your mortgage?" A. "He does; he says he represents the Chicago Cattle Loan Company and the National Live Stock Bank both; I will prove by him that their offices are together, and that he went there in February to examine the security pledged to the Chicago Cattle Loan Company by this mortgage, the one dated October 17th, 1900; that mortgage came due in April, 1901, and was renewed, or a new mortgage given in place of it, which is the mortgage we claim under in this suit, and the mortgage we claim under bears date about April 17th, 1901."

By the Court: "Then it was a second mortgage; was a renewal mortgage of a previous debt?"

By Mr. Strawn: "Yes, sir."

By the Court: "What I first suggested was the point that Mr. True was investigating a loan already made?"

By Mr. Strawn: "Yes, sir."

By the Court: "Now, if I understand your statement, the mortgage which was executed to secure that loan, and another mortgage, or a second mortgage made to secure the same loan?"

By Mr. Strawn: "Yes, sir."

By the Court: "And that is the mortgage under which you are claiming?"

By Mr. Strawn: "That is right."

Again, at page 85, said October, 1900, mortgage was referred to by plaintiff, Chicago Bank's counsel, by the following question:

Q. "I refer now to the mortgage which was at that time owned by the Chicago Cattle Loan Company, which bore date of about October 17th, 1900."

At page 89 of the Record may be found the testimony of Levy P. Doud, who was president of the plaintiff, Chicago Bank, and vice-president of the Chicago Cattle Loan Company.

Again, at pages 90 and 91 of the Record, appears the following question and answer in the testimony of Mr. Doud:

Q. "There has been introduced in evidence a certified copy of a chattel mortgage purporting to have been given by W. B. Grimes, Jr., to the Siegel-Sanders Live Stock Commission Company under date of October 24th, 1900, securing his notes of like date, for sums of $7,033.24 and $7,000, each due six months after date, and cover 633 head of native cattle; what, if anything, did you ever have to do as the representative of the Chicago Cattle Loan Company with that mortgage and the notes secured thereby? A. I approved of the Cattle Loan Company buying that paper with the chattel mortgage on the cattle as security for the same.

Q. At or about what time? A. *In October or the early part of November,* 1900."

It thus appears that the Chicago Cattle Loan Company bought said notes and mortgage which were made in October, 1900, either in said month of October or the early part of November, 1900, and as the release which was given by Siegel-Sanders Live Stock Commission Company, attempting to release the mortgage held by the defendant, Geneseo Bank, was filed for record on November 27th, 1900, it results from the foregoing testimony of President Doud that the purchase and payment by the Chicago Cattle Loan Company was prior to the recording of said release, and that said purchase by said Chicago Cattle Loan Company was not made upon the faith of or reliance of said Chicago Cattle Loan Company upon said release. The testimony of President Doud at page 91 of the Record is conclusive that said Chicago Cattle Loan Company bought and paid for and became the owner of said notes and mortgage given in October, 1900, either in *"October or the early part of November,* 1900."

And the testimony of Inspector True (p. 83, Record) and the testimony of President Doud (p. 89, Record) show that the inspection of Mr. True in February, 1901, was after said purchase in October or the early part of November, 1900, by the Chicago Cattle Loan Company.

It is thus made manifest that the purchase of the note and mortgage by the Chicago Cattle Loan Company was not made upon the faith of the subsequent report made in the following February, 1901, by Inspector True.

It is also thus made manifest that the purchase made by the Chicago Cattle Loan Company of the notes and mortgage given in October, 1900, was not made upon the basis of the recorded release, which was recorded a month or so after that purchase.

With regard to the notes and mortgage in this suit relied upon by the plaintiff, Chicago Bank, which, as we have already seen, were in renewal of the notes and mortgage given in October, 1900, President Doud testified as follows:

> "Q. State what, if anything, you gave to the Siegel-Sanders Live Stock Commission Company on the 27th day of April, 1901, in consideration for the two notes and chattel mortgage you have just described? A. We credited their account for the amount of the notes, less the discount." (Page 92, Record).

See to the same effect the testimony of Frank P. Swain, at page 94 of the Record.

This testimony shows that there was some bookkeeping by both the Chicago Cattle Loan Company and the plaintiff, Chicago Bank, at the time of the renewal of the notes and mortgage in April, 1901, but there is nothing in the evidence to show that the giving of the renewal to the plaintiff Bank was in anywise different from what the transaction would have been if the renewal had been given to the Chicago Cattle Loan Company instead of to the plaintiff, Chicago Bank.

The circumstances attending the purchase of those notes and the mortgage given in October, 1900, by the Chicago Cattle Loan Company, were given in the deposition of Frank P. Swain at pages 94 to 98 of the printed Record. Mr. Swain had charge of the offices of Siegel-Sanders Live Stock Commission Company in Chicago, and the transaction of the purchase by the Chicago Cattle Loan Company of the notes and mortgage in October or the early part of November, 1900, from Frank P. Swain, who had charge of Siegel-Sanders Live Stock Commission Company's office in Chicago, took place at Chicago, and there is nothing to show in the evidence that there was any examination of the records of the

register of deeds office in Clark county, Kansas, prior to the examination made by Inspector True, in February, 1901, or that plaintiff Bank called for any information from Swain at the time of its purchase.

In the trial of the case in the trial Court Mr. Menferd Brown, who is the register of deeds of Clark county, Kansas, was called to testify, and at pages 69 and 70 of the Record it appears that among other questions Mr. Brown was asked the following:

> "Q. Were assignments for either of the mortgages you have referred to ever filed in the office o the register of deeds of Clark county, Kansas?
>
> This question was objected to by counsel for the defendant, Geneseo Bank, for the reason that it is incompetent, irrelevant and immaterial, and not required under the statutes of Kansas. This objection was by the Court overruled and the defendant, Geneseo Bank, at the time excepted? A. No, sir.
>
> Q. Were assignments for either of them ever given you to be filed? A. No, sir.
>
> Q. Where do you make a record of notation of assignments of chattel mortgages which are filed with you for record? A. *I have never had one filed; if I should I would make a note of it as I do releases or renewal and attach it to the original instrument.*"

The said mortgage made April 17th, 1901, and held by the plaintiff, Chicago Bank, was offered in evidence by plaintiff's counsel (p. 65, Record).

POINTS AND AUTHORITIES.

I.

This case should have been brought to this court by appeal and not by writ of error, and the writ of error should be dismissed.

Stringfellow v. *Cain*, 99 U. S., 610, l. c., 612-613-614;
Davis v. *Fredericks*, 104 U. S., 618-619;
Neslin v. *Wells*, 104 U. S., 428;
Hecht v. *Boughton*, 105 U. S., 235;
United States v. *Railroad Co.*, 105 U. S., 263;
Gray v. *Howe*, 108 U. S., 12;
Story v. *Black*, 119 U. S., 235;
Idaho Land Co. v. *Bradbury*, 132 U. S., 509, l. c., 513;
Gregory Mining Co. v. *Starr*, 141 U. S., 222;
San Pedro Co. v. *United States*, 145 U. S., 130;
Mining Co. v. *Machine Co.*, 151 U. S, 447;
Bonnifield v. *Price*, 154 U. S., 672;
Hawes v. *Mining Co.*, 160 U. S., 303;
Grayson v. *Lynch*, 163 U. S., 468;
Young v. *Amy*, 171 U. S., 179;
Marshall v. *Burtis*, 172 U. S., 630;
Cohn v. *Daly*, 174 U. S., 539.

II.

Even if this case were here on appeal instead of by writ of error, this court is without jurisdiction to consider the case, because there is no finding of facts in the nature of a special verdict by either the Supreme Court of Oklahoma or the District Court of Woodward county, Oklahoma. This is necessary to give this court juris-

diction. The statement of facts in the opinion of the Oklahoma Supreme Court on the first hearing does not constitute a finding of facts in the nature of a special verdict.

Dickinson v. *Bank,* 16 Wall., 250, l. c., 252-256;
Lahner v. *Dickson,* 148 U. S., 71, l. c., 74;
Saltonstall v. *Birtwell,* 150 U. S., 417;
Stone v. *United States,* 164 U. S., 380;
Kentucky Life Ins. Co. v. *Hamilton,* 63 Fed. Rep., 93; 11 C. C. A., 42;
Minchen v. *Hart,* 72 Fed. Rep., 294; 18 C. C. A., 570;
National Masonic Ass'n v. *Sparks,* 83 Fed. Rep., 225; 28 C. C. A., 399, l. c., 403;
Mutual Reserve Ass'n v. *DuBois,* 85 Fed. Rep., 586; 29 C. C. A., 254.

III.

On the facts shown by the record in this case and recited in our statement of facts, the Chicago Bank was not a subsequent purchaser *bona fide* for value without notice of its notes and mortgages.

Vol. 1 Ency. Plead. & Prac., p. 880;
Boone v. *Childs,* 10 Pet., 177, l. c., 211;
Vol. 2 Pomeroy Eq. Jurisp. (2nd Ed.), Secs. 784-785;
Holdswosth v. *Shannon,* 113 Mo., 508, l. c., 524;
Ins. Co. v. *Smith,* 117 Mo., 261, l. c., 293.

IV.

It is conceded that the Geneseo Bank had no actual knowledge of the filing of the release or of the filing of the mortgage under which the Chicago Bank claims.

That release and the mortgage of the Chicago Bank were filed and recorded months after the filing and recording of the mortgage of the Geneseo Bank. It is well settled that a prior mortgagee is not affected with constructive notice of any instrument made and filed by his mortgagor subsequent to the filing of his mortgage.

Tydings v. *Pitcher*, 82 Mo., 379;
Meier v. *Meier*, 105 Mo., 412, l. c., 433;
Sensenderfer v. *Kemp*, 83 Mo., 582;
Ford v. *Church Ass'n.*, 120 Mo., 498, l. c., 516;
2 Jones on Mortgages, Sec., 1624.

The general principle applicable to the registry laws of the different states upon the point of notice is that the registering of instruments is notice to subsequent purchasers and encumbrancers only. The filing for record of the unauthorized and void release of the mortgage held by the Geneseo Bank and the filing for record of the mortgage held by the Chicago Bank were, therefore, not notice to the Geneseo Bank which held under a prior recorded mortgage.

Ackerman v. *Hennicker*, 85 N. Y., 43, l. c., 50;
Gen. St. Kans., 1899 (Dassler's Compilation), Sec. 4060-4062, p. 842;
Rowen v. *Mfg. Co.*, 29 Conn., 282, l. c., 325;
Schmidt v. Zahrndt, 148 Ind., 447, l. c., 451;
Tapia v. *Deamartini*, 77 Cal., 383, l. c., 387;
Nelson v. *Boyce*, 7 J. J. Mar. (Ky.), 401; l. c., 404;
Ward v. *Cooke*, 17 N. J. Eq., 93, l. c., 99;
Shirras v. *Craig*, 7 Cranch., 34, l. c., 51;
Trust Co. v. *Iron Works*, 51 N. J. Eq., 605, l. c., 607;
Summers v. *Roos*, 42 Wis., l c., 778;
Witzzinski v. *Everman*, 51 Miss., 841;
George v. *Wood*, 9 Allen, 80, l. c., 83;
McDaniels v. *Cohn*, 16 Vt., 300, l. c., 306;
Seymour v. *Darrow*, 31 Vt., 122, l. c., 134.

V.

While the real estate mortgage laws of Kansas contain ample provisions for the assignment of a real estate note and mortgage, no provision has ever been enacted by the Kansas Legislature authorizing or permitting the making and recording of an assignment of a chattel mortgage and there has been no law at any time in that State which authorized or permitted the Genesoe Bank to obtain and record an assignment of its chattel mortgage. Dassler's Statutes of Kansas, 1899, p. 842-845, Secs. 4060-4078. Therefore, the law is with the Geneseo Bank.

The Statutes of Kansas, in relation to real estate mortgages containing the provision authorizing the filing and recording of assignments of real estate mortgages, may be found in the same volume of the Kansas Statutes from p. 837 to p. 842. See also:

Carpenter v. *Langan*, 16 Wall., 271;
Burhaus v. *Hutchinson*, 25 Kas., 625;
Insurance Co. v. *Huntington*, 57 Kans., 744;
Bronson v. *Ashlock*, 7 Kans. App., 255-259;
Swift v. *Smith*, 102 U. S., 442;
Railway Co. v. *Bank*, 136 U. S., 283;
Jones on Chattel Mortgages, Sec. 662 (a)-633;
Biggerstaff v. *Marstin*, 161 Mass., 101;
Watson v. *Wyman*, 161 Mass., 106;
Mulcahy v. *Fenwick*, 161 Mass., 164;
Hoffman v. *Boteler*, 87 Mo. App., 316;
Brooke v. *Struthers*, 68 N. W. Rep., 272;
Lee v. *Clark*, 89 Mo., 553;
Hagerman v. *Sutton*, 91 Mo., 519, l. c., 532;
Swift v. *Bank of Washington*, 104 Fed. Rep., 643;
Cummings v. *Hurd*, 49 Mo. App., 139;
Walter v. *Logan*, 63 Kans., 193;

20 Am. & Eng. Enc. Law (2nd Ed.), 1045-1046;
Robinson v. *Campbell*, 60 Kans., 60;
De Laurel v. *Kemper*, 9 Mo. App., 77;
Lakeman v. *Roberts*, 9 Mo. App., 179;
Bank v. *Buck*, 71 Vt., 190;
Parker v. *Randolph*, 5 S. D., 54—;
Williams v. *Paysinger*, 15 S. C., 171;
Black v. *Reno*, 59 Fed. Rep., 917;
Brewer v. *Atkeison*, 121 Ala., 410;
Roberts v. *Halstead*, 9 Pa. St., 32;
Anderson v. *Karaider*, 52 Neb., 171;
Kelon v. *Smith*, 97 Ill., 156;
Stiger v. *Bent*, 111 Ill., 329;
Preston v. *Morris*, 2 Ia., 549;
Martindale v. *Burch*, 57 Ia., 291;
Tandercosk v. *Baker*, 48 Ia., 199;
Gordon v. *Mulhore*, 13 Wis., 22;
Demoth v. *Bank*, 85 Md., 315;
Laping v. *Duffy*, 47 Ind., 51;
Dixon v. *Hinter*, 57 Ind., 278;
Reeves v. *Hayes*, 95 Ind., 521;

These authorities fully vindicate and support the proposition that where there is no law authorizing the holder of a negotiable note secured by a mortgage to put on the record an assignment of the mortgage, the subsequent release of that mortgage by the original mortgagee and the subsequent conveyance or mortgage by the mortgagor to a third party are unavailing as against the holder of the first mortgage note.

VI.

Sec. 4246 of the Chattel Mortgage Law of Kansas (Dassler's Statutes of 1901, p. 896), provides that every holder of a mortgage may keep his mortgage alive by fil-

ing an affidavit during the last thirty days of the year following the recording of his mortgage, and since the Chicago Bank took its mortgage within the year and before the time had arrived when the Geneseo Bank could file the affidavit contemplated by that provision, it follows that the Chicago Bank, in view of that statute, is not a subsequent purchaser or mortgagee in good faith.

Meech v. *Patchen*, 14 N. Y., 71;
Howard v. *Nat'l Bank*, 44 Kansas, 549;
Bank v. *Bank*, 46 Kans, 376.

The Chattel Mortgage Law of Kansas, in all its provisions, recognizes the transferee of a negotiable note secured by a chattel mortgage as the "assignee," where the word "assignee" is used in that statute. Secs. 4068-4069, p. 844, of Dassler's Kans. Stat. of 1899, provide, as follows:

> "After condition broken, the mortgagee *or his "assignee*, may proceed to sell the mortgaged prop- "erty, or so much thereof as may be necessary to "satisfy the mortgage and costs of sale, having first "given notice of the time and place of sale by writ- "ten or printed handbills posted up in at least four "public places in the township or city in which the "property is to be sold, at least ten days previous "to the sale."
>
> "If the mortgagee *or his assignee* shall have "obtained possession of the mortgaged property, "either before or after condition broken, the mort- "gagor or any subsequent mortgagee may demand "in writing a sale of such property. In such case "the mortgagee shall proceed to sell the property, "having first given the same notice as provided in "the preceding section."

The case of *Bohart* v. *Buckington*, 62 Kans., 658, is an express adjudication by the Kansas Supreme Court that the original mortgagee in a chattel mortgage, after

he endorses and transfers the negotiable note secured by the mortgage, has no beneficial interest in the mortgage and cannot maintain an action of replevin or trover in his own name, but such action must be brought by the transferee of the negotiable promissory note as the real holder and owner of the note and mortgage and therefore as being the "assignee" within the meaning of the Kansas chattel mortgage statute. See also:

Wiscum v. *Huberly*, 51 Kans., 580.

VII.

The release of the mortgage of the Geneseo Bank was void because the same was not acknowledged. It was improperly recorded for that reason. What is said by the Supreme Court of Oklahoma in its opinion in this case, commencing at p. 147 of the printed record herein, fully covers this point.

ARGUMENT.

I.

We will first consider the attitude of the plaintiff, Chicago Bank, with reference to its claim of being an innocent, *bona fide* purchaser for value, without notice of the defendant Geneseo Bank's title to the cattle in question.

It will not be denied by counsel for plaintiff, Chicago Bank, that the title of the defendant, Geneseo Bank, was good in its inception, and so continued thereafter, and that it is still good as against everybody except a subsequent, innocent, *bona fide* purchaser for value, without notice. We shall discuss in the third point of this argument the proposition that the title of the defendant, Geneseo Bank, is good, even as against a subsequent, innocent, *bona fide* purchaser for value, without notice, and we shall assume the affirmative of that proposition, namely, that it is a good title as against a subsequent innocent, *bona fide* purchaser for value, without notice, who purchased after and on the faith of said release.

But if the plaintiff, Chicago Bank, does not have the right in this case, upon the pleadings and the evidence, to maintain the claim that it is a subsequent innocent, *bona fide* purchaser for value, without notice, that is the end of the case, and judgment must go for the defendant, Geneseo Bank.

The admitted facts show that the mortgage held by the defendant, Geneseo Bank, was made and recorded in accordance with the laws of Kansas, in the months of June and July, 1900, and it was agreed and stipulated at the trial, among other facts brought out in the evidence, that said note and mortgage became the property

of the defendant, Geneseo Bank, and have been owned and possessed by it ever since the month of July, 1900. Said note held by the defendant, Geneseo Bank, was and is negotiable, being payable to order, and was endorsed and guaranteed by Siegel-Sanders Live Stock Commission Company. It results, therefore, that the release given by Siegel-Sanders Live Stock Commission Company in November, 1900, four months after defendant Bank became its owner, was wholly unauthorized and invalid as to the defendant, Geneseo Bank, and there is no pretense in the case that Siegel-Sanders Live Stock Commission Company was the agent, for any purpose, of the defendant, Geneseo Bank.

Said release was, therefore, void, both in law and in fact.

But the attitude of the plaintiff, Chicago Bank, is, that that release acquired validity as against the defendant, Geneseo Bank, in favor of the plaintiff Bank, because of the attitude claimed for the plaintiff, Chicago Bank, that it was a subsequent innocent, *bona fide* purchaser for value without notice.

If the plaintiff, Chicago Bank, is not entitled in this case, on the pleadings and evidence, to maintain that proposition, then, as before stated, that is the end of the case, and the judgment must be affirmed.

Now, at the very threshold of the case, it will be observed that there is nothing said by plaintiff, Chicago Bank, in any of its pleadings about its claim of being a subsequent innocent, *bona fide* purchaser for value, without notice. The prior valid title of the defendant, Geneseo Bank, is fully disclosed in its answer (p. 23, Record), and was admitted by the parties at the trial. And if the plaintiff, Chicago Bank, had intended, in framing its reply, to rely upon the claim of its being a subsequent innocent, *bona fide* purchaser for value, without notice, it

should have been pleaded in that reply; but said claim is not pleaded in any form or in any way referred to in the reply of plaintiff, Chicago Bank (p. 31, Record). On the contrary, the reply of the plaintiff, Chicago Bank, pleads that the note held by the defendant, Geneseo Bank, was, in fact, held by Siegel-Sanders Live Stock Commission Company at the time of its giving the release in question. The language of the reply is as follows:

> "That on, to-wit, the 24th day of November, A. D. 1900, said note being then the property of Siegel-Sanders Live Stock Commission Company, and due, the amount of the same was by the maker thereof, to-wit, W. B. Grimes, Jr., paid to said Siegel-Sanders Live Stock Commission Company by the execution and delivery to it of another note for about the sum of fourteen thousand dollars."

And then follows the averment of the reply that at the time of such payment being made, said Siegel-Sanders Live Stock Commission Company, the holder of the note so paid, executed the release in question.

This is the reply of the plaintiff, Chicago Bank, to the prior valid title shown by the defendant, Geneseo Bank, in its answer, but the undisputed and admitted facts in evidence show that this defense is wholly without support in the proof. It is a conceded fact, on the admissions of the counsel, and on the evidence, as we have seen in our statement, that the defendant, Geneseo Bank, owned and held said note from July, 1900, continuously.

Of course the defense pleaded in the reply of the plaintiff, Chicago Bank, that Siegel-Sanders Live Stock Commission Company was the owner of the note at the time of the payment to it by the renewal and the giving of the release by it, was a good reply on its face to the answer of the defendant, Geneseo Bank, but the trouble with that answer of the plaintiff, Chicago Bank, in its

reply was and is that it was not supported by the proof, but the plaintiff, Chicago Bank, in lieu and instead of that defense, relied on the trial below, and relies hereupon the claim of its being a subsequent innocent, *bona fide* purchaser for value, without notice.

We submit, in the first place, that plaintiff, Chicago Bank, must fail on this claim because it was not pleaded. The rule is as old as law and equity that where a party, that is a plaintiff or defendant, relies, in order to defeat the conceded title of his adversary, upon the claim of his being an innocent, *bona fide* purchaser for value, without notice, he must affirmatively plead the same in his pleadings in the case. Thus, in Vol. 1, Encyclopedia of Pleading and Practice, page 880, it is said:

> "The defense that defendant is a *bona fide* purchaser for a valuable consideration, without notice, may be taken by answer as well as by plea."

And in the leading case of *Boone* v. *Childs,* 10 Peters, pages 177, 211, the doctrine is expressly sanctioned by this Court, that where the claim of a party being an innocent purchaser for value, without notice, is relied upon, it must be pleaded, and in that connection it is said by this Court that in pleading the claim of innocent purchaser for value, without notice, it must be with a distinct averment that it was *bona fide* and the consideration truly paid, independently of the recital in the deed, and notice must be averred previous to and down to the time of paying the money and the delivery of the deed. Not only should it be pleaded, but it must be proved by the party pleading it.

And in Vol. II, Pomeroy's Equity Jurisprudence, 2nd Ed., Section 784, the doctrine is there recognized that both under the old equity system of pleading and under the code, where the claim of being an innocent purchaser for value, without notice, is relied upon, it must

be pleaded, and in Section 785, of the same work, it is stated that in pleading "innocent purchaser for value, without notice," the plea must show that the consideration has actually been paid, and not merely secured, and should also deny notice in the fullest and clearest manner, and this denial is necessary, whether the notice is charged in the complaint or not, or in the adverse pleadings.

An examination of these authorities will show that the plaintiff, Chicago Bank, has no right in this case to rely upon the claim of its being an innocent, subsequent, *bona fide* purchaser for value, without notice, because it has not pleaded the same.

See also:

Life Ins. Co. v. *Smith,* 117 Mo., pp. 261 to 293;

Holdsworth v. *Shannon,* 113 Mo., 508-524.

But if plaintiff, Chicago Bank, had properly pleaded the claim of its being a subsequent, innocent, *bona fide* purchaser for value, without notice, still it would fail because the evidence does not support that claim. The quotations that we have made in our statement of facts from the opening statement of plaintiff, Chicago Bank's counsel, and from the agreements and stipulations of counsel, and from the testimony of the witnesses, show that the money that was paid for the title obtained by the plaintiff, Chicago Bank, was paid, as testified to by President Doud, by the Chicago Cattle Loan Co., either in the month of October or the early part of November, 1900. That payment was made, therefore, before the recording of the release in question on November 27th, 1900, and as the money for the title of the plaintiff, Chicago Bank, was paid before the filing of the release in question, plaintiff, Chicago Bank, cannot claim to occupy the attitude of a subsequent, innocent, *bona fide* purchaser

for value, without notice. It did not make the payment after or on the faith of that release. The note and mortgage which were given in April, 1901, and which are now held by the plaintiff, Chicago Bank, were given, as we have seen from our statement, as a renewal of the note and mortgage purchased by the Chicago Cattle Loan Company in October or the early part of November, 1900. There is no pretense that any money was paid at the time of the renewal in April, 1901. It was simply a renewal of the note and mortgage given in October, 1900. It is true that President Doud, who was an officer of both the Chicago Cattle Loan Company and of the plaintiff Bank, testified (p. 89, Record), as did also Mr. Frank P. Swain (p. 94, Record), that the Siegel-Sanders Live Stock Commission Company received credit by the plaintiff Bank on the giving of the renewal note and mortgage in April, 1901, but this is not inconsistent with the idea of a simple renewal. It is probable that there were the usual bookkeeping entries made at the time of the renewal. This would naturally include, first, the debiting of Siegel-Sanders Live Stock Commission Company with the amount of the October, 1900, note and mortgage, when they matured in April, 1901, and when the renewal note and mortgage of April, 1901, were given, it was very natural, as President Doud and Mr. Frank P. Swain both testified, that a credit should also be given. This is all that was done, but this bookkeeping does not show that the plaintiff, Chicago Bank, parted with anything of value over and above what the Chicago Cattle Loan Company had paid for the note and mortgage in October, 1900, or the early part of November of that year.

The opening statement of the plaintiff Bank's counsel, the admissions and stipulations of the parties, and the evidence of President Doud and Inspector True, referred to in detail and by reference to pages of the Rec-

ord in our foregoing statement of facts, show that the Chicago Cattle Loan Company and the plaintiff, Chicago Bank, were one and the same. The case, therefore, stands before the Court, so far as the claim of paying the consideration is concerned, upon the payment made by the Chicago Cattle Loan Company in October, 1900, or the early part of November, 1900. A mere renewal of the paper in April, 1901, was not a payment of anything by either the Cattle Loan Company or the plaintiff Bank. On the undisputed facts it cannot be claimed as a matter of fact or of law that anything was paid by either the Cattle Loan Company or the plaintiff Bank after the filing of the release in question on November 27th, 1900.

An examination of the authorities that we have cited will show that the burden of bringing itself within the attitude claimed, of being a subsequent, innocent, *bona fide* purchaser for value, without notice, rests upon the plaintiff, Chicago Bank, in order to defeat the prior unquestioned and admitted good title of the defendant, Geneseo Bank. There is, as is required in such cases, no such distinct proof in this case on the part of the plaintiff, Chicago Bank, of a payment of anything of value after the recording of the release on November 27th, 1900, to authorize, even if it were in the pleadings, the plaintiff Bank to maintain this claim of its being a subsequent, innocent, *bona fide* purchaser for value, without notice. There is no proof whatever of such payment.

This being so, the defendant, Geneseo Bank, is entitled to the judgment of the Court, irrespective of any other considerations applicable to the case on the pleadings of the parties and also on the evidence.

II.

It is also insisted that the defendant, Geneseo Bank, is estopped because of its continued silence after the recording of the release in question, on November 27th, 1900. This estoppel is one *in pais,* if it exists. The answer to this proposition is:

First. Estoppel is not pleaded in the case by the plaintiff, Chicago Bank, in its reply.

Under our code system, where estoppel is relied upon, in order to defeat the title set up by the defendant in its answer, it should be pleaded in the reply.

Bliss on Code Pleading, 3rd Ed., Section 364.

But even if estoppel had been pleaded by plaintiff, Chicago Bank, in its reply, there is nothing in the evidence to sustain any such claim. There is nothing in the plaintiff's evidence, or, for that matter, in the record, to show that the defendant, Geneseo Bank, had any knowledge of said release until after it was brought out in this suit.

Was the defendant, Geneseo Bank, charged with constructive notice of the filing and recording of said release?

Wherever a system of public registration of deeds and conveyances exists, we understand the rule to be that the holder of a title is only charged with constructive notice of recorded deeds in the line of his title. The owner of property is not charged with notice of the recording of a deed which is not in the chain of his title.

In *Tydings* v. *Pitcher,* 82 Mo., 379, it was decided that the record of a deed lying outside of a purchaser's chain of title imparts no notice to him.

In the same case it was decided that a recital in a deed in the purchaser's chain of title, that the purchase

money therefor is unpaid, is notice to him of a vendor's lien, and puts him on inquiry as to the existence of every fact that the existence of the lien would imply or lead to, and such purchaser is put upon inquiry as to the fact that the lien may have been extinguished by an unrecorded deed conveying the premises back to the original owner.

That case decides that a conveyance or instrument lying outside of the chain of title of the owner is not, upon being recorded, constructive notice to him, but it also bears upon the question already discussed, of the attitude of the plaintiff in this case of being a subsequent, innocent, *bona fide* purchaser for value, without notice.

The latter point decided by the case, and the reasoning of the Court in support of it, show that it was the duty of the plaintiff Bank, or the Cattle Loan Company, to make inquiry as to where the note held by the defendant, Geneseo Bank, was held, in making the purchase of the renewal notes given in October, 1900.

The plaintiff, Chicago Bank, or what is the same thing, the Chicago Cattle Loan Company, was put upon inquiry when it made its purchase in October, 1900, as to where defendant Geneseo Bank's note was held. The defendant, Geneseo Bank's mortgage had been on record since July, 1900. It secured a negotiable promissory note. There is no pretense or claim that the plaintiff, Chicago Bank, or the Chicago Cattle Loan Company, made any demand on Siegel-Sanders Live Stock Commission Company, in October, 1900, for the production of the note held by the defendant Bank. If the plaintiff Bank, or the Cattle Loan Company had made demand in October, 1900, for the production of the defendant Bank's note, the plaintiff or the Cattle Loan Company would have learned that said note was out-

standing and was not held by the Siegel-Sanders Company. The fact that defendant, Geneseo Bank's note was payable at the office of the Siegel-Sanders Company did not excuse plaintiff Bank or the Cattle Loan Company from calling for its production.

Ward v. *Smith*, 7 Wall., 447.

In the case of *Sensenderfer* v. *Kemp*, 83 Mo., 582. it was decided that one is not charged with constructive notice of deeds on record when he does not claim by or through them. The defendant, Geneseo Bank, does not claim by or through the unauthorized release, given by the Siegel-Sanders Company. On the contrary, the defendant Bank claims adversely to that release.

So in the case of *Meier* v. *Meier*, 105 Mo., 412, 433, it was held that the record of a deed given by a mortgagor, after the execution of a prior mortgage, does not constitute notice to the prior mortgagee.

It results, therefore, that the defendant, Geneseo Bank, was not affected with constructive notice of the unauthorized release given and filed on November 27th, 1900, by Siegel-Sanders Company, nor was the defendant Bank affected with constructive notice of either of the renewal mortgages given in October, 1900, and April, 1901, to the Siegel-Sanders Company.

See also:

Ford v. *Church Society*, 120 Mo., 498, 510.

The learned author of Jones on Mortgages, Vol. 2, Sec. 1624, speaking of the rights of a mortgagee, states the rule as follws:

> "The record of a subsequent deed is not, how-
> "ever, notice to the prior mortgagee. He is not re-
> "quired to search the records from time to time to
> "see whether other incumbrances have been put up-
> "on it. A distinct and actual notice is necessary to
> "affect the rights of the mortgagee in this respect

"and oblige him to foreclose with reference to the "subsequent order of alienation. The record is not "even subsequent notice to him."

The general principle of construction of the registry laws upon the point of notice is, that the registration of deeds and incumbrances is notice to subsequent vendees and incumbrancers only. The filing for record of the unauthorized release and of the mortgage held by the Chicago Bank were therefore not notice to the Geneseo Bank which held under a prior recorded mortgage.

Ackerman v. *Hennicker*, 85 N. Y., 43, l. c., 50;
Gen. Stat. Kansas, 1899 (Dassler's), Sec. 4060-4062, p. 842;
Rowan v. *Mfg. Co.*, 29 Conn., 282, l. c., 325;
Schmidt v. *Zahrndt*, 148 Ind., 447, l. c., 451;
Tapia v. *Demartini*, 77 Cal., 383, l. c., 387;
Nelson v. *Boyce*, 7 J. J. Mar. (Ky.), 401, l. c., 404;
Ward v. *Cooke*, 17 N. J. Eq., 93, l. c., 99;
Shirras v. *Craig*, 7 Cranch, 34, l. c., 51;
Trust Co. v. *Iron Works*, 51 N. J. Eq., 605-607;
Summers v. *Roos*, 42 Miss., 749, l. c., 778;
Witczinski v. *Everman*, 51 Mass., 841;
George v. *Wood*, 9 Allen, 80, l. c., 83;
McDaniels v. *Calvin*, 16 Vt., 300, l. c., 306;
Seymour v. *Danon*, 31 Vt., 122, l. c., 134.

As the defendant, Geneseo Bank, had no actual notice of either the release in question or of the renewal mortgages given by Grimes in October, 1900, and in April, 1901, under which the plaintiff Bank claims, and as the defendant, Geneseo Bank, was and is not affected with constructive notice of either of those mortgages or of said release, it results that the claim of estoppel wholly fails, and could not be considered as sustained, even if it had been pleaded by plaintiff, Chicago Bank, in its reply.

III.

But independently of each and both of the foregoing considerations, we submit that the law of this case is with the defendant, Geneseo Bank.

This is a case of a Kansas mortgage. The cattle, at the time of the several mortgages involved in this case, and the residence of the mortgagor, Grimes, were all in Clark County, Kansas. The statute of Kansas applicable to this case is made a part of the record in this case for the consideration of this Court, by stipulation of the parties, without reference as to whether said statute is pleaded by either party.

The statute of Kansas applicable to mortgages of personal property, in the years 1900 and 1901, when these mortgages were given, may be found in Dassler's General Statutes of Kansas for the year 1899, from page 842 to 845, and from Sections 4060 to 4078. We do not deem it necessary to copy in this brief, or in an appendix thereto, the whole of the Kansas statutes relating to Kansas mortgages of personal property. As our statement shows, the said three mortgages were severally made and recorded conformably to those statutes.

It will not be denied that there is no provision in said chapter in relation to mortgages of personal property in Kansas requiring the assignee of a mortgage to obtain a written assignment of the same and to file the same with the register of deeds of the county. There is no such provision requiring either the making or the recording of such assignment of a chattel mortgage in the Kansas statutes.

In the same volume of the Kansas statutes, stated above, from page 837 to page 842 of the same, may be found the chapter of the Kansas statutes in relation to mortgages of real property, and an examination of that

chapter will show that the Kansas legislature made specific provisions, full and in detail, requiring assignments of real estate mortgages to be made and recorded, but, as before stated, although the Kansas legislature made full and specific provisions for the making and recording of assignments of real estate mortgages, no corresponding provision is to be found in the next succeeding chapter in relation to mortgages of personal property. If at this point we apply to these two chapters the maxim *"Expressio unius est exclusio alterius,"* it follows that the Kansas legislature intended, in regard to mortgages of personal property, that the free transfer of such mortgages should be unfettered by the making and recording of assignments in analogy to the common law requiring no record of personal property transfers.

It also follows that there was no law which permitted the defendant, Geneseo Bank, at the time in July, 1900, when it bought its note and mortgage, to obtain and file of record an assignment of its note and mortgage. The statutes in regard to mortgages being silent on the subject, the assignment of the mortgage to the defendant, Geneseo Bank, became complete upon the sale endorsement, and delivery of the note secured by the mortgage given to Siegel-Sanders Live Stock Commission Company to the defendant Bank. Of course, the Bank could not file or record with the register of deeds its note or the endorsement on the back of it. There never was a law requiring or permitting such a thing to be done. But the mortgage purchased in July, 1900, by the defendant Bank, secured a negotiable promissory note, and when the Bank became the purchaser and owner of that note it thereby, and without more, became the assignee of the mortgage, and all persons dealing with the mortgaged cattle thereafter were affected with notice that defendant Bank's mortgage, which was given for the benefit equally of the mortgagee or his assignee,

might be held by an assignee instead of being held by the original mortgagee. After the assignment all the rights and powers of the original mortgagee vested in and devolved upon the defendant Bank by virtue of its purchase of the note and its title as assignee acquired thereby.

Defendant Geneseo Bank's mortgage (p. 27 record), in several places contains the provisions, "Said second party, its successors and assigns, and in the clause of the mortgage giving the right of foreclosure at the maturity of the debt, or in case of a removal or attempt to remove, the mortgaged property, the mortgage provides that, "Then and thenceforth it shall be lawful for the said party of the second part, *its successors or assigns*, or its authorized agent, to enter upon the premises of said party of the first part, or any other place or places wherein said goods and chattels or live stock may be, to remove and dispose of the same as aforesaid, without resort to law," and then follows a provision authorizing either public or private sale of the mortgaged property by the mortgagee, or in case of an assignment, by the assignee. The mortgage of the defendant Bank is the same in the above respects as chattel mortgages generally.

The subject of satisfaction of chattel mortgages in Kansas in force in 1900 and 1901, is provided for in Section 4076 of said Dassler's Kansas Statutes for 1899, and is as follows:

> "4067. Satisfaction. When any mortgage of personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, *his assignee* or personal representative, to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be, and under the same penalty for neglect or refusal as provided in case of the satisfaction of mortgages of

real estate. The entry of satisfaction shall be made in the book in which the mortgage is entered, as hereinbefore provided; and any instrument acknowledging satisfaction shall not be recorded at length, but shall be referred to under the head of 'Remarks,' and filed with the mortgage or copy thereof, and preserved therewith in the office of the register."

The subject of obtaining possession of mortgaged personal property in Kansas, by either the mortgagee or his assignee, is provided for in Sections 4068 and 4069 of said Dassler's Statutes, which read as follows:

"4068. Sell Property. After condition broken, the mortgagee *or his assignee* may proceed to sell the mortgaged property, or so much thereof as may be necessary to satisfy the mortgage and costs of sale, having first given notice of the time and place of sale by written or printed hand-bills posted up in at least four public places in the township or city in which the property is to be sold, at least ten days previous the sale."

"4069. Demand Sale. If the mortgagee *or his assignee* shall have obtained possession of the mortgaged property, either before or after condition broken, the mortgagor or any subsequent mortgagee, may demand in writing a sale of such property. In such case the mortgagee shall proceed to sell the property, having first given the same notice as is provided in the preceding section."

These three sections in regard to the satisfaction of a chattel mortgage and a sale by the mortgagee or his assignee, each and all conclusively show that where there is an assignee of a chattel mortgage he stands in the place of the original mortgagee, and since the Kansas statutes, in regard to chattel mortgages, contain no provision for the making or filing of a separate or formal assignment, it results that the word "assignee" in said sections applies to a case like the one at bar, where the

mortgage is assigned by the mere endorsement, transfer and delivery of the note secured by the mortgage.

The proposition on this branch of the case, contended for by the defendant, Geneseo Bank, was decided by the Supreme Court of Kansas in *Burnhans* v. *Hutcheson*, 25 Kansas, 625. That case clearly recognizes the distinction between mortgages securing negotiable promissory notes and mortgages securing non-negotiable promissory notes, and it was held in that case that although at the time of its decision, and at the time of the transaction therein considered, there was a statute in Kansas regarding the assignment of real estate mortgages, such statute did not apply to mortgages securing negotiable promissory notes, and it was further held that where a mortgage on real estate is given to secure a negotiable promissory note, and before the maturity of the note, the note and mortgage are transferred by endorsement and delivery of the note to a purchaser, the mortgagor, although having no notice whatever of such assignment and transfer, cannot thereafter pay off said mortgage to the mortgagee so as to defeat the real owner and holder thereafter from recovering. In the opinion in that case there is a full consideration of this subject, and, among other cases, the case of *Carpenter* v. *Longan*, 16 Wall., 271, is approved by the Kansas Supreme Court.

The Court, in its opinion in *Burhans* v. *Hutcheson*, says, in speaking of the provision of the real estate mortgage statute, respecting the assignment of real estate mortgages, as follows:

> "Section three speaks of the recording of the assignment of the mortgage and does not by its terms refer to negotiable paper, and it seems to us a strange interpretation to hold this provision applicable when the debt is evidenced by a negotiable note secured by a mortgage upon real estate, when said mortgage is merely ancillary thereto and fol-

lows the note wherever it goes, deriving its character from such instrument."

In that case the mortgagor had made a conveyance of land to the mortgagee in satisfaction of the mortgage debt, after the mortgagee had transferred the note and mortgage, and it was held that the transfer of the real estate to the mortgagee did not extinguish the mortgage held by the plaintiff, and the Court in this connection says:

> "Nor was it necessary for the plaintiff to record the assignment of the mortgage to protect himself from payment to the mortgagee. The notes and mortgage went together, and the mortgagor having made the conveyance and payment without a surrender of the notes and mortgage, did so at his peril."

This subject again received consideration and was determined by the Kansas Supreme Court in the year 1897, in the case of *Insurance Co.* v. *Huntington,* 57 Kansas, 744. In that case it was adjudged that the assignment and delivery of a negotiable promissory note, before maturity, operates as an assignment of the mortgage given as security for the payment of the note, and that after such transfer the original mortgagee has no power to release or discharge the lien of the mortgage, and that a release made by him, without authority, will not affect the rights of the assignee.

It was further adjudged in that case that an assignee of a duly recorded mortgage is authorized to discharge the same by an entry upon the margin of the record acknowledging satisfaction of the mortgage, signed by himself in the presence of the register or his deputy, who shall subscribe the same as a witness, and that when an entry is so made, subsequent mortgagees must take notice thereof.

In that case one Hill executed and delivered a negotiable promissory note to one Gunn and others, and at the same time executed a mortgage upon 64 lots in the city of Fort Scott to secure said note. There was a stipulation in the mortgage that for every $75.00 paid a lot should be released. After the execution of the mortgage the note was transferred to Huntington and payment thereon guaranteed by the payees. Subsequently a number of the lots included in the mortgage were sold by Hill, the mortgagor, and upon payments made Huntington, the assignee of the note, released and discharged of record the lots so sold. These releases were made on the margin of the record of the mortgage in the register of deed's office. Afterwards the payee of the note entered a release and discharged the mortgage upon two of the lots, and thereafter, one Bye, who had become the owner of said two lots, mortgaged said two lots so released by the mortgagee to the Mutual Benefit Life Insurance Company, and made a second mortgage to the Matthewson Company, and with the proceeds of these two mortgage loans, Bye, the purchaser from the original mortgagor, Hill, erected two dwelling houses on the two lots in question. Afterwards, Huntington, who as we have seen, was the assignee of the note before the entry of satisfaction by the mortgagee of those two lots, instituted a foreclosure proceeding against the two lots, and the Insurance Company, as mortgagee of Bye, and Angell, Matthewson & Company, the second mortgagee, set up their mortgages claiming that they were superior to the mortgage of Huntington. This state of facts presented, as will thus be seen, the same identical question arising in this case. The Trial Court in that case gave a judgment in favor of Huntington, the assignee, and found that the release executed by the payees of the note, after they had transferred it and the mortgage to Huntington, was null and void, and did not operate to dis-

charge the lots from the lien of the Huntington mortgage, and a decree was entered declaring the foreclosure judgment on the mortgage of Huntington to be a first and superior lien upon the lots in question, without regard to the improvements thereon.

The Supreme Court of Kansas, in affirming the decree of the Trial Court in that case, used the following language:

"The note was negotiable; and it is well set-
"tled that, where such a note is secured by a mort-
"gage, the note is the principal and the mortgage is
"the incident, and that an assignment of the note is
"an assignment of the mortgage. No obligation
"rested upon Huntington to record his assignment
"in order to protect himself against the subsequent
"mortgagee. As the mortgage was given to secure
"a negotiable note, it could be assigned by the mere
"endorsement or delivery of the note, and there
"was in fact no assignment to record. It has been
"expressly held that the *bona fide* holder of negoti-
"able paper, transferred to him by endorsement
"thereon before maturity and secured by a real estate
"mortgage, need not record the assignment of the
"mortgage. *Burhans* v. *Hutcheson*, 25 Kan., 625.

"After assigning the note and mortgage, the
"mortgagees had no interest therein, and no power
"to release or discharge the lien of the mortgage;
"and, being wholly without authority, the release
"executed by them cannot affect the rights of the
"assignee. When the plaintiffs in error found upon
"the record a mortgage securing a negotiable note,
"it was their duty to inquire whether the release was
"executed before or after the assignment and by
"persons having authority to do so. 1 Jones Mort-
"gages, Sec. 814.

"The statute recognizes the assignee as a proper
"party to release or discharge a mortgage lien, and
"provides that this may be done by an entry on the
"margin of the record, signed by him in the pres-
"ence of the register of deeds or his deputy, who

"shall subscribe the same as a witness. Sec. 3889, "Gen. Stat. 1889."

As we have already seen, the statute in regard to mortgages of personal property in Kansas did not permit such a thing as the making and filing of the assignment of a chattel mortgage, and that this idea has been acted upon by the people of Kansas is shown by the testimony in this case of the register of deeds of Clark County, Kansas, who testified that no assignment of a chattel mortgage had ever been filed in his office (pp. 69 and 70, Record).

As bearing on this same question, we also refer to the case of *Bronson* v. *Ashlock*, 2 Kansas Appeals Rep., 255, 259.

The case of *Carpenter* v. *Longan*, 16 Wall., 271, which was decided in 1872 by this court, and which is approved by the Supreme Court of Kansas in the 25th Kansas report already cited, is a leading case on this subject.

In that case it was adjudged that where a mortgage given at the same time with the execution of a negotiable note and to secure payment of it, is subsequently, but before the maturity of the note, transferred to a *bona fide* purchaser for value, without notice, the holder of the note, when obliged to resort to the mortgage, is unaffected by any equities arising between the mortgagor and mortgagee, subsequent to the transfer, or of which the assignee had no notice at the time it was made. He takes the mortgage as he did the note.

We invite the serious consideration to this case of *Carpenter* v. *Longan*, because it is authority in this Court, and is now recognized generally as containing a sound exposition of the law on this subject.

The case of *Swift* v. *Smith*, 102 U. S., 422, is also in point. In that case the release did not acknowledge the payment of the note, but simply purported to be a

release of the land and of the right, title and interest acquired by the trustee by virtue of the trust deed given in that case to secure the debt evidenced by a note which had been transferred to a third party, and it was held in that case that the transferee had the better title, and that his title, by virtue of the transfer of the mortgage and note, was unaffected by the subsequent release.

See also the remarks of the Supreme Court of the United States, in its opinion in the case of *Railway Company* v. *Merchant's Bank,* 136 U. S., 283.

So in Jones on Chattel Mortgages, Section 662 (a), that author says:

> "A release of record, made by a mortgagee "after he has assigned a negotiable note not due se- "cured by the mortgage, will not discharge it, as "against an assignee of such note which remains "unpaid."

The reason for the distinction made by the legislature in the statute of Kansas, in expressly providing for assignments of real estate mortgages, while industriously refraining from making any provision respecting assignments of mortgages of personal property, is discussed in Section 663, in Jones on Chattel Mortgages, as follows:

> "In many states it is provided that mortgages of personal property, which have been recorded or filed as provided by statute, shall, upon payment, be discharged or satisfied by a release or entry upon record, and penalties are imposed upon mortgagees who neglect or refuse to make such discharge. Such a provision for the discharge of mortgages of real estate is to be found upon the statute books of almost every state and territory; but in only a part of the states is there such an enactment in relation to chattel mortgages. This difference in legislative enactments in regard to the discharge of real estate mortgages and those relating to the discharge of mortgages of personal property arises from the

fundamental distinction between real and personal property. The title to real property can be transferred only by deed; and the policy of the recording acts requires that every deed of such property shall appear of record. But no deed in writing is necessary for the transfer of title to personal property. A purchaser takes the title of his vendor, and must rely upon his possession or upon his warranty. 'A mortgage duly recorded,' said Mr. Justice Hoar of Massachusetts, 'gives certain rights to the mortgagee, created and defined by the statute, but the statute does not change the nature of the property, nor require that all subsequent changes shall be shown upon the record. An assignment or release of the mortgage is not required to be recorded.'

"The states, therefore, which require the recording of a release or satisfaction of a chattel mortgage, do not make the requirement because the same necessity exists as in the case of mortgages of real property, but because there is a certain convenience in having the record made clear upon the payment of the debt."

In the case of *Biggerstaff* v. *Marston,* 161 Mass., p. 101, it was adjudged that if a mortgage and note secured thereby, given by A. to B., are assigned by B. to C., before maturity, and A., in ignorance of such assignment, makes payment on account of the principal and interest to B., who is not the financial agent of C., and B. does not and is not asked to produce the note and indorse the payments thereon, but gives receipts therefor. A., in making those payments, acts at his own peril, and not having paid to the owner or owner's agent, must be held to have acted in his own wrong.

It was also adjudged in that case that it is not the duty of a purchaser of a note and mortgage secured thereby to notify the mortgagor of his purchase, but it is the duty of the mortgagor, if he proposes to pay the debt before maturity, to require the actual production of

the note, when making such payment to the original mortgagee.

See also:

Watson v. *Wyman,* 161 Mass., 96;
Mulcahy v. *Fenwick,* 161 Mass., 164.

In that case it was likewise adjudged that negligence is not imputable to the assignee of a mortgage because he does not notify the mortgagor that he has taken an assignment, or because he does not demand payment at the maturity of the mortgage.

See also:

Hefferman v. *Boteler,* 87 Mo. App., 316;
Brooke v. *Struthers,* 68 N. W. Rep., 272.

The case of *Lee* v. *Clark,* 89 Mo., p. 553, is precisely in point in this case. There it was adjudged that the payee of a note, secured by a deed of trust, after he has assigned the note before maturity, cannot, by entering satisfaction of the debt on the margin of the record, or in any other manner, release the property from the lien, as between a *bona fide* purchaser and the assignee of the note.

See also:

Hagerman v. *Sutton,* 91 Mo., 519-532.

A very recent case, which is also decisive of the question in controversy in this cae, is the case of *Swift* v. *Bank of Washington,* 104 Fed. Rep., 643. That was a decision by the United States Circuit Court of Appeals for the 8th Circuit, and the case was decided in March, 1902. The opinion was delivered by Judge Caldwell. The cases of *Carpenter* v. *Longan,* 16 Wall., 271, and *Burhans* v. *Hutcheson,* 25 Kansas, 625, were cited and followed.

That case, like the case at bar, arose in the state of Kansas. It was adjudged that the assignment of a note,

before maturity, to a *bona fide* holder, carried with it a chattel mortgage executed as security therefor, and that the assignee alone could thereafter discharge the mortgage lien, and that payment of the indebtedness to the original mortgagee, by a purchaser of the mortgaged property, after the assignment of the note, was insufficient, although the purchaser had no notice of the assignment.

It was further decided in that case that a provision in a chattel mortgage that when the mortgaged property was ready for market it was to be consigned to the mortgagee and the proceeds applied to the mortgage debt, did not authorize payment to the mortgagee, after the not had been assigned to someone else.

In the mortgage in that case was a provision which recited that the mortgage was intended as security for the mortgagee as long as he was, "In any manner in-"terested in the payment of the indebtedness, either as "payee, indorser, guarantor or otherwise, as well as for "the security of the assignee or indorsee, and such trans-"fer or assignment shall not carry with it the sole right "to enforce the mortgage, but the same shall be vested "severally in the second party (mortgagee) concurrently "with such transferee or assignee," and it was held by the court in that case that that clause in the mortgage did not authorize payment to the mortgagee, after the note had been assigned to someone else.

Notwithstanding said last quoted provision in the mortgage under consideration in said case of Bank of Washington, the court there decided the case in favor of the assignee, who occupies the same position in that case as the defendant, Geneseo Bank, in this case.

In *Cummings* v. *Hurd,* 49 Mo. App., 139, it is said:

> "It is a well settled general rule that if a debtor owing money on a written security pays to or set-

tles with another as agent, it is his duty at his peril to see that the person thus paid, or settled with, is in possession of the security. If not thus in possession the debtor must show that the person to whom he pays or to whom he settles has special authority or has been represented by the creditor to have such authority."

See also *Walter* v. *Logan,* 63 Kansas, 193, which was decided by the Kansas Supreme Court in 1901.

The law on this whole subject is summarized in the following terse statement in the chapter on mortgages in Vol. 20 of the American & English Encyclopedia of Law (2nd Ed.), at pages 1045 and 1046.

"Effect of Release or Discharge of Mortgagee. "A mortgagee of land cannot rightfully release or "discharge the mortgage after an assignment there- "of unless authorized by the assignee, and therefore "his release or discharge will not affect the rights of "the assignee where the mortgagor or his grantee "had actual or constructive notice of the assign- "ment, or where the mortgage was given to secure "a negotiable note. But if the recording acts afford "the assignee the opportunity of giving notice of "his rights by procuring and putting on record a "written assignment of the mortgage, a neglect on "his part to do so will estop him from asserting the "invalidity of a duly recorded release or discharge "executed by the mortgagee, as against an innocent "purchaser who has paid his money for the prop- "erty without notice of the assignment and on the "faith of the public records."

This statement of the law was published in the second edition of this work in 1902, and in notes 6, 7 and 8 of the text thus quoted may be found a summary of some of the latest cases decided by the American Courts on this question.

In addition to the foregoing case we beg leave also to cite the following:

Robinson v. *Campbell,* 60 Kansas, p. 60.

And in the case of *Bohart* v. *Bockham,* 62 Kansas, 658, it was held by the Kansas Supreme Court, in 1901, that a mortgagee in a chattel mortgage, after assigning the note, together with the chattel mortgage to secure it, had no right or power left under the mortgage to sue in an action of replevin for the mortgaged property; that the holder and owner of the note as the real party in interest was the only party who could maintain an action of trover or replevin for the mortgaged cattle.

In this case there is not a fact or circumstance which did or could make Siegel-Sanders Live Stock Commission Company the agent, for any purpose, of defendant, Geneseo Bank, but even if it could be conceded, for the sake of argument, though not as a fact, that the Siegel-Sanders Live Stock Commission Company, for some undefined purpose, was the agent of the defendant, Geneseo Bank, still the plaintiff, Chicago Bank, is confronted with the proposition of law that a third person claiming under the act of an agent performed by him under an authority subject to limitation is bound to take notice of the limitation and the extent of such authority and the conditions requisite for its exercise.

Mechem on Agency, Secs. 273, 276 and 291.

The Siegel-Sanders Live Stock Commission Company, if they had authority to release the mortgage of the defendant, Geneseo Bank, only possessed that authority up to the time of the transfer and sale of the note and mortgage to the said defendant, Geneseo Bank, and the plaintiff, Chicago Bank, and the Chicago Cattle Loan Company were bound to take notice that after Siegel-Sanders Live Stock Commission Company had parted with its title to said note, said Siegel-Sanders Live Stock

Commission Company no longer had authority to make the release in question, and if the plaintiff, Chicago Bank, or Cattle Loan Company, had made inquiry of the Siegel-Sanders Live Stock Commission Company and demanded the production of the note at the time of its renewal by the giving of the new note and mortgage in October, 1900, the plaintiff, Chicago Bank, or Cattle Loan Company, would have ascertained, beyond question, that the Siegel-Sanders Live Stock Commission Company did not have the note so as to be empowered to make the release.

It certainly is not required at this day to cite to the court authorities sustaining the proposition that a purchaser is bound to take notice of every fact which he could ascertain by means of inquiry. He is held in law to have notice of all such facts which he could ascertain upon inquiry, the same as if he actually knew them.

In *DeLaurel* v. *Kemper,* 9 Mo. App., page 77, it was adjudged that an entry of satisfaction of a deed of trust on the margin of the record thereof, by one claiming to be the assignee of the notes secured thereby, but who, in fact, is a stranger thereto and not in possession thereof, is void.

See also to the same effect:

Lakeman v. *Robard,* 9 Mo. App., page 179.

In the case of *Savings Bank* v. *Buck,* 71 Vermont, 190, where a purchaser of property which had been mortgaged to secure a note transferred by the mortgagee to a third party, made no further inquiry, but relied upon the recorded discharge, it was held that such purchaser could not defend against the foreclosure of the first mortgage, because he was charged with notice of the fact, which he could have learned upon inquiry, that the first mortgage was outstanding and had never been finally discharged.

In the case of *Parker* v. *Randolph*, 5 S. D., page 549, it was adjudged that the transfer of a note secured by a mortgage carries with it the mortgage also, and that where the original mortgagee and payee sold said note without an assignment of said mortgage to the purchaser of the same, and then takes a subsequent mortgage upon the same property and fraudulently discharges the prior mortgage, he can gain no advantage thereby, either for himself or for one for whom he is acting as agent in any transaction directly involving the property mortgaged.

The case of *Williams & Company* v. *Paysinger*, 15 South Carolina Reports, page 171, which was decided in 1880, is in some respects much like the case at bar. In that case, as appears from the head-note of the case, land was mortgaged by A. to B. for the purchase money. B. assigned his notes and mortgages to C., and C. assigned to D. This mortgage is duly recorded, but not the assignments. In that state an assignment of a mortgage is not required by law to be recorded. Afterwards A., not knowing of the assignment to D., gave new notes of the same amounts and payable at the same time, and a new mortgage to C., in satisfaction of the original notes and mortgage, which were not surrendered, C. saying that they were out at his home. Failing to pay the first note to C. at maturity, A. gave up possession of the land to C., and C. afterwards mortgaged it to other parties. The land having sold for enough to pay the first mortgage only, it was held that D. was entitled to the entire proceeds of sale. In the opinion in that case the court used the following language:

> "When Paysinger, for a valuable considera-
> "tion, assigned to Wheeler the first notes and mort-
> "gage of Sanders, he transferred the title and placed
> "it beyond his control. He could not afterwards
> "receive payment of the notes or enter satisfaction

"of the mortgage. An entry of satisfaction by a "mortgagee, after he has parted with his right in "the security, will not discharge the mortgage in "favor of one who has acquired an interest in the "land before the discharge was made. 2 Jones on "Mortgages, 157; Hill on Mortgages, 517; *Much-"ler* v. *Wadlington*, 5, s. c., 346; *Lynch* v. *Han-"cock*, 14 s. c., 66.

"But it is said that Sanders had no notice of the "assignment to Wheeler; that, at least, he was an "innocent party, who had the right to deal with "Paysinger, as the owner of the mortgage, and that "he must be protected. If it is meant by this that "in order to protect the rights of Sanders the second "notes and mortgages must stand as against Wheel-"er, it is difficult to understand how this transaction "can be good as to Sanders, while it is bad as to "Paysinger. Notice to the mortgagor of the assign-"ment is not necessary to its validity. There is no "law requiring the assignment of a mortgage to be "recorded, and if it had been put on record it would "not have amounted to constructive notice. The "doctrine of constructive notice by recording is not "to be extended to all papers which are, in fact, "recorded, but only to those which are authorized or "required to be recorded. 1 Story Equity Jurispru-"dence, 404; *Harper* v. *Barsh*, 10 Richardson "Equity, 149.

"Although there is no proof that Sanders had "actual notice, we do not consider him without "fault in the matter. The circumstances were "enough to put him on inquiry. The first mortgage "had been given by Sanders to Stevens, who had "assigned to Paysinger, and he to Wheeler. "Neither the notes nor the mortgage were before "the parties at the time of the execution of the new "notes and mortgage. Sanders knew that it was "an unusual proceeding to replace old notes se-"cured by a mortgage by others for precisely the "same amounts, and another mortgage by the same "party on the same tract of land, and that should

"have suggested inquiry as to the purposes. As "was said in the case of *Lynch* v. *Hancock, su-* "*pra,* 'common prudence would have suggested the "propriety of an inquiry as to whether all the bonds "had been paid or the lien securing the payment "properly released.' Sanders executed the new "notes and mortgage in place of the old ones with- "out taking up the latter or indeed seeing them. "The referee states that Paysinger said, 'that they "were at his house,' which seemed to satisfy San- "ders. It seems to us he was too easily satisfied. "Upon making a payment upon a mortgage, a "debtor should always require the production of "the note or bond secured by it. Otherwise it may "turn out that the evidence of the debt has been as- "signed. 2 Johnson on Mortgages, Section 956. "Where a recorded mortgage is discharged by a "person other than the mortgagee, the person pay- "ing the money, and a subsequent purchaser as well, "are bound to inquire what authority he had to "discharge it, and are charged with notice of such "facts as by proper inquiry might have been ascer- "tained. 2 Jones on Mortgages, 959; *Swartout* v. "*Cuett,* 5 N. Y., 30."

In the case of *Black* v. *Reno,* 59 Fed. Rep., page 917, it was held by the United States Circuit Court for the Eastern District of Missouri that where a negotiable note secured by a mortgage, duly recorded, is transferred for value before maturity to a third person, a subsequent acknowledgment of satisfaction by the mortgagee of the debt secured, does not impair the lien of the mortgage, unless it was made with the knowledge or consent of the holder of the notes, and hence the purchaser of the mortgaged land is not protected by such release, though he purchases on the faith of it.

See also *Brewer* v. *Atkeison,* 121 Ala., 410, which was decided in 1898.

Roberts v. *Halstead,* 9 Pa. St., 32;
Anderson v. *Kreidler,* 52 Neb., 171.

In the case of *Kehone* v. *Smith*, 97 Ill., 156, it appeared that a negotable note secured by a mortgage was assigned before maturity. Subsequent to the recording of the mortgage and the indorsement and delivery of the note, and before the maturity of the note, the mortgagor procured a loan from a third person and gave a second mortgage upon the same premises with the understanding that a portion of the money obtained from the second mortgage should be applied in satisfaction of the first mortgage. The mortgagor did pay the amount of the first mortgage debt out of the money received from the second mortgagee to the payee of the first mortgage note, who thereupon released the first mortgage. Upon a foreclosure bill filed by the assignee and holder of the first mortgage note, it was held that it not appearing that the payee to whom the loan had been paid was authorized to receive it in behalf of the assignee or had paid it over to him, the second incumbrancer held subject to the lien of the first mortgage.

It was also held by the Supreme Court of Illinois in that case that the second mortgagee, having notice of the prior mortgage, was put upon inquiry as to whether or not it had been assigned. Being so put upon inquiry, he was chargeable with notice of the rights of the assignee.

So in the case of *Stiger* v. *Bent*, 111 Ill., 329, it was adjudged by the Illinois Supreme Court that an entry of satisfaction of a deed of trust, by the trustee, when the indebtedness secured by it has not been paid, and the act is not authorized by the holder of the indebtedness, will have no effect upon the deed of trust, as between the original parties, or as to subsequent purchasers with notice, and it was also held that where a trustee enters satisfaction of a trust deed, duly recorded, in consequence

of a negotiation for the purchase of the land and for the purpose of consummating the sale, and accepts payment of the amount of the debt secured from such purchaser without obtaining and canceling the note, and without authority from the holder thereof, the purchaser cannot be said to have purchased without notice of the rights of the holder of the note.

See also *Preston* v. *Morris,* 42 Iowa, 549.

Martindale v. *Birch,* 57 Iowa, 291, was like the case at bar. It was a case of a chattel mortgage which had been executed to one King on a printing press to secure ten notes for the sum of $80.00 each. The defendant in the case purchased the printing press from the mortgagors. One of the notes had been endorsed and transferred by the mortgagee, King, to the plaintiff. The purchaser of the property, on inquiry of the mortgagor, was assured that there were no notes outstanding unpaid. The purchaser had no actual knowledge that the note in suit was owned by the plaintiff or that it was in existence. The mortgage at the time of the purchase was on record but was not released. Afterwards, the purchaser procured a written release of the mortgage. The Supreme Court of Iowa, in its opinion, uses the following language:

> "When King indorsed the note in suit to plain-
> "tiff the effect thereof was to transfer the lien of
> "the mortgage *pro tanto,* and no assignment of the
> "mortgage was necessary. That an assignment or
> "transfer of a note secured by a mortgage, operates
> "as an assignment of the lien, is a settled rule of the
> "law. This transfer of the lien was not in any man-
> "ner affected by a mistake in the date of the note.
> "Birch (the purchaser), was not in the least in-
> "jured, deceived or misled by the mistake. He was
> "charged, by the record of the mortgage, with the
> "correct amount of the note and the time of its
> "maturity. Was his release, upon the information

"which he received from the mortgagee and Siegler, "sufficient to protect him from the establishment of "this note as a lien upon the property? It appears "to us clearly that it was not. That the purchaser of "mortgaged property may safely rely upon state- "ments of the mortgagor that the debt had been "paid is a proposition that no one would contend for. "The possession of the mortgage by Siegler was a "circumstance tending to mislead him, but this was "clearly insufficient. The mortgage secured the "payment of 22 notes in all, and the notes having "been transferred to different persons, one only "could have possession of the mortgage. The mort- "gage recites that payment of the notes shall be "made to King, or his assigns, etc., and the defend- "ant was charged with notice of such assignments "as had been made."

So in *Tandercosk* v. *Baker,* 48 Iowa, 199, it was held that the transfer of a promissory note carries with it a mortgage executed to secure it and the mortgagee, after the transfer of the note, has no such control over the security that he can discharge or impair it to the prejudice of the transferee.

It was also held in that case that the assignee of a promissory note is not chargeable with the fraud of the mortgagee in procuring the registration of a mortgage executed to secure it. This case was, like the case at bar, a contest between the assignee of the mortgage note and a subsequent purchaser from the mortgagor, after the unauthorized release was made.

See also *Gordon* v. *Mulhore,* 13 Wis., 22.

We desire, in addition to the foregoing authorities, to refer the court to the case of *Demuth* v. *Bank of Baltimore,* 85 Maryland, 315. This case is also similar to the case at bar, and we invite the consideration of that case specially by the court in passing on this case.

So in the case of *Lapping* v. *Duffy*, 47 Ind., 51, it was adjudged that a mortgagee, who has a note secured by a mortgage, cannot by his entry of satisfaction of the mortgage upon the mortgage record affect the rights of the assignee of a judgment on the note and for a foreclosure of the mortgage. Incumbrancers, whose liens were created after such entry, will not be protected as purchasers for value without notice of such prior lien.

Afterwards, in 1877, the Indiana legislature passed a law providing the recording of assignments of mortgages. Subsequently there came up to be heard in the Indiana Supreme Court the case of *Dixon* v. *Hinter*, 57 Ind., 278; but, as the facts in said last case of *Dixon* v. *Hinter* arose prior to the said Act of 1877, providing for the recording of assignments of mortgages, the Supreme Court of Indiana, in said case of *Dixon* v. *Hinter*, followed the rule decided in the previous case of *Lapping* v. *Duffy*, 47 Ind., 51. The Court, as in most of the other cases, recognized a clear distinction between the rule which exists in jurisdictions where there is no statute requiring assignments of mortgages to be recorded, and the rule which exists in states where there is such a statute.

So, again, the Indiana Supreme Court, in the case of *Reeves* v. *Hayes*, 95 Ind., 521, adjudged that prior to said statute of 1877, providing for the recording of assignments of mortgages, there was no law authorizing the record of an assignment of a mortgage, and that such record, if made prior to that statute, would not have been notice to subsequent purchasers or mortgagees in good faith.

It was also adjudged in that case that, after assigning the debt secured by a mortgage, the mortgagee has no power to enter satisfaction of a mortgage, and such

entry of satisfaction by him on the margin of the record will not give priority to a subsequent mortgagee in good faith without actual notice of the assignment of the debt.

There is a very full consideration, in the opinion of the Court, in this case, and many cases cited. Among the cases cited is the case of *Burhans* v. *Hutcheson,* 25 Kansas, 625.

To sum up the whole matter in a few words, it seems to us too plain to require the further citation of authorities, that since there has never been any statute in Kansas requiring or permitting the recording in the office of the register of deeds of the assignment of a chattel mortgage, the title of the defendant, Geneseo Bank, in this case must be held to be the better title, and must prevail over the title of the plaintiff, Chicago Bank.

IV.

We insist on the point that this case, like all other cases, must be tried on the pleadings. The defense of the Chicago Bank to the note and mortgage of the Geneseo Bank, as disclosed by the reply of the Chicago Bank, was simply and solely that the note of the Geneseo Bank was held by the Sieger-Sanders Company at the time that company gave the release relied upon. Of course, if that averment was true, that was in itself a complete and sufficient answer to the contention of the Geneseo Bank. A release may always be given by the party who holds and owns the note. But there were no averments in the reply of the Chicago Bank which met the case of the Geneseo Bank upon the fact disclosed by its answer and by the evidence that the Geneseo Bank owned its note and mortgage long prior to the giving by the Siegel Company of its release. There was nothing, we repeat, in the reply of the Chicago Bank to meet that

case. In order to meet that case the reply of the Chicago Bank should have shown by distinct, positive and affirmative averments that the Chicago Bank paid full value in cash for its note and mortgage. There is no averment in the reply of the Chicago Bank to notify either the Court or the opposing counsel that the Chicago Bank relied upon the plea of an innocent purchaser for value, without notice. Its sole defense, as disclosed by its reply, was that the Siegel Company, which gave the release, owned the note and mortgage at the time of giving the release, and therefor had authority to give the release. We insist that upon the pleadings alone the Geneseo Bank is entitled to the judgment of the Court. This contention is especially applicable to this case, because the Chicago Bank was the plaintiff below. The title of the Geneseo Bank was fully disclosed in its answer. The plaintiff came back and sought to meet the case made by the Geneseo Bank in its answer by a special reply. We suggest that the plaintiff is bound by this reply. Furthermore, the reply of the Chicago Bank discloses how the note and mortgage held by the Geneseo Bank was paid. The reply says that the Geneseo Bank's note and mortgage was paid by a renewal given, not to the Geneseo Bank, but the reply says it was given to the Siegel Company. The averment in the reply that the Geneseo Bank's note and mortgage was paid by that renewal taken in connection with the agreement and confession of the Chicago Bank at the trial, that the Geneseo Bank held its note and mortgage from a short time after it was given is a confession that the Chicago Bank is not an innocent purchaser. The Chicago Bank cannot be an innocent purchaser on the statement made by it in its reply that the negotiable note held by the Geneseo Bank was paid by the giving of a renewal note to another party. The renewal note which the Chicago Bank confesses in its reply was given in October, 1900, can not extinguish the

negotiable note in renewal of which it was given if it was not held by the party to whom the renewal note was given. The Cattle Loan Company and the Chicago Bank knew that as well as they know anything. The Cattle Loan Company and the Chicago Bank ought not to have accepted the note and mortgage given in October, 1900, as a renewal of the old note and mortgage held by the Geneseo Bank without at least making some inquiry of the Siegel Company where that note was. Nothing is better settled than that a negotiable promissory note cannot ordinarily be paid without the production of the note itself. Neither the Cattle Loan Company or the Chicago Bank had a right to rely upon the statements of the Siegel Company in this respect, no matter how positive or emphatic those statements may have been. On this branch of the case the Chicago Bank made open confession of our case and acknowledged that some inquiry should have been made at the time of the giving of the renewal note and mortgage in October, 1900, of the note and mortgage held by the Geneseo Bank. In the brief of the Chicago Bank on the first appeal, its counsel confess but do not avoid our case. Again, not only the note and mortgage given in October, 1900, was a renewal, but our statement shows the note and mortgage now held by the Chicago Bank was a renewal of the note and mortgage given in October, 1900. How is the note and mortgage in suit a renewal of the other one given in October, 1900, unless the Chicago Bank and the Cattle Loan Company be one and the same. There is no showing either in the evidence or in the argument of the counsel of the Chicago Bank that that bank ever paid the Cattle Loan Company a nickel for the note and mortgage given in October, 1900. The case shows that the Chicago Bank and the Cattle Loan Company are one and the same. Nor is there anything to show that the Chicago Bank paid the Siegel Company anything

at the time of the giving of the last renewal in April, 1901. It is true that the Chicago Bank in its brief on the first appeal, says that the Chicago Bank "actually advanced to the Siegel-Sanders Company the said sum of $15,389.54 in cash." There is not a particle of evidence in the case to warrant that statement. And the error of that statement is shown by what immediately follows in the brief in the same connection, as follows: "That amount less the discount being credited to the account of the said Commission Company." How the credit was given is not shown by the Chicago Bank, upon whom the burden of making out the case of an innocent purchaser rested. President Doud, in his testimony, "We credited their account (meaning the Siegel-Sanders Company) for the amount of the notes less discount." That answer implies that the Chicago Bank had a running account growing out of these mortgages with the Siegel-Sanders Company, and if, as was probable, the October, 1900, note and mortgage were, on their maturity, charged up by the Chicago Bank in the account that President Doud testifies to, against the Siegel-Sanders Company, then when the last renewal note and mortgage were given the credit that he speaks of was proper. But that credit was not a payment of anything to the Siegel-Sanders Company, but was simply a matter of bookkeeping. There is nothing to show in the testimony of Doud or anybody else that any sum was placed to the credit of the Siegel-Sanders Company subject to check or draft, when the renewal of April, 1901, was given, or that the Siegel-Sanders Company ever received a dollar. The Counsel of the Chicago Bank, at page 33 and page 34 of their brief on the first appeal, says: "The evidence is conclusive that the defendant in error at the time it purchased its notes and mortgage actually advanced to the Siegel Company in cash $15,389.54." We repeat that there is not a particle of evi-

dence in the case to warrant that statement. The case of the Chicago Bank stands, therefore, upon the purchase made in October, 1900, by the Cattle Loan Company of the notes and mortgage given at that time. And if the Cattle Loan Company was not, in October, 1900, a *bona fide* purchaser by purchasing in advance of the giving of the release relied upon, then the Chicago Bank is not a *bona fide* purchaser, because its case stands upon the purchase made and the cash paid by the Cattle Loan Company, in October, 1900.

In addition to the foregoing it should be borne in mind upon the proposition of the Chicago Bank that it is an innocent purchaser for value without notice, that by Section 4246, of the Chattel Mortgage Law of Kansas, Dassler's Statute of 1901, page 896, it was provided as follows:

> "Every mortgage so filed shall be void as against the creditors of the person making the same or against subsequent purchasers or mortgagees in good faith after the expiration of one year after the filing thereof, unless within 30 days next preceding the expiration of the term of one year from such filing, and each year thereafter the mortgagee, his agent or attorney, shall make an affidavit extending the interest of the mortgage at the time last aforesaid claimed by virtue of such mortgage, and if said mortgage is to secure the payment of money, the amount yet due and unpaid. Such affidavit shall be attached to and filed with the instrument or copy on file to which it relates."

This section of the Kansas chattel mortgage law has been in force for many years, and was in force both in 1900 and 1901, during which time the transactions in this case took place. That section of the Kansas chattel mortgage law has several times been construed by the Kansas Supreme Court, and it has always been held by that Court that any person taking a mortgage or buy-

ing personal property which has been mortgaged within a year makes his purchase subject to the right of the holder of the note under the mortgage to continue the lien thereof beyond the year by filing the affidavit prescribed by the statute during the last thirty days of the year. The theory of that section is that whether the chattel mortgage be given for 3, 6, 9, 12 or 18 months the holder of the chattel mortgage note has an unquestioned lien for one year from the time of the recording of his mortgage. This statute was construed in the case of *Howard* v. *National Bank*, 44 Kan., 549. It was there held that the words "subsequent purchasers" and "subsequent mortgagees in good faith," as used in that statute, meant only purchasers and mortgagees who purchased or took their mortgages after the expiration of one year from the filing of the mortgage. It was also held in that case that the taking of a second mortgage to secure the same debt secured by a first mortgage and upon the same property, does not operate as a satisfaction and release in lieu of the first mortgage. In the opinion of the Kansas Supreme Court in that case a citation is made from the case of *Meech* v. *Patchen*, 14 N. Y., 71, where the following language is used, in speaking of the duty of a subsequent mortgagee or purchaser:

> "Should he find a mortgage on file, he could not determine, without the help of the third section, whether the lien still continued, whatever length of time had elapsed since the filing; but by means of the provision in that section he could be certain that the mortgage had ceased to be a lien if he found that it had not been renewed within one year. *If his examination was made within the year, he must proceed at his peril, or take other means to ascertain whether the mortgage remained a lien.*"

When the plaintiffs in this case took their mortgage the defendant's mortgage was on file, and they according-

ly had the notice which the statutes contemplated. The year from the time when it was filed had not elapsed and no default or want of diligence had therefore happened on the part of the Geneseo Bank. If this suit had not been brought within eleven months from the time of the filing of the mortgage of record held by the Geneseo Bank and the Geneseo Bank had during the last thirty days of the year, in accordance with the above statute, filed its affidavit, there could be no question but what its title would have been continued beyond the year and that the Chicago Bank could not claim to be a subsequent mortgagee or purchaser for value in good faith. That this suit was brought before the expiration of the eleven months after the filing of the Geneseo Bank Mortgage, and that the filing of the affidavit by the Geneseo Bank was dispensed with by the bringing of this suit within the eleven months do not alter or affect the rights of the parties. The Geneseo Bank had, during the eleven months which preceded the time of the filing of the affidavit, substantially foreclosed its mortgage by taking into its possession the cattle in controversy, thereby dispensing with the necessity of filing the affidavit, and the case before the Court, therefore, is just the same as if the Geneseo Bank had filed the affidavit, and as if this suit had not been brought, and as if the Geneseo Bank had not attempted to foreclose its mortgage by taking possession of the property. And if the Chicago Bank could not claim to be a subsequent mortgagee or purchaser in good faith in the event that the Geneseo Bank had filed an affidavit, then it cannot claim to be a subsequent purchaser or mortgagee in good faith in this case, in view of the bringing of this suit and such attempted foreclosure. According to the doctrine of this case of *Howard* v. *National Bank,* the Chicago Bank and the Cattle Loan Company took their notes and mortgages within one year from the time of the filing of the mort-

gage of the Geneseo Bank at their peril, and it was their duty before taking their notes and mortgages within the year to make distinct inquiry as to whether the lien of the Geneseo Bank was still in full force, especially so, as they bought before the filing of the release. The Chicago Bank, as we have already seen in its other brief, confesses that it did not make inquiry, although it was their duty to do so. They confess that if they had made inquiry and had learned that the notes were held by the Geneseo Bank, they still would have taken the word of the Siegel-Sanders Company to satisfy it. As already seen they confess, but do not avoid our case.

The Kansas Supreme Court, in the case of *Farmers Bank* v. *Bank of Glen Elder*, 46 Kan., 376, reaffirm the holding in said case of *Howard* v. *National Bank*. In this last case Chief Justice Horton, who delivered the opinion of the Court, used this language:

> "He who purchases after the year has expired during which a mortgage remains in force has a right, in the absence of the ordinary affidavit, to suppose the mortgage has been paid, even though not released on the record, but he who purchases before the mortgage expires takes with notice of the mortgage and the rights of the mortgagee under the same. Therefore, the plaintiff having taken a second chattel mortgage soon after the filing of the first mortgage was not a subsequent mortgagee in good faith so as to have a prior lien to the first mortgage, although the first mortgage was not properly renewed within the year."

Nor does the fact that Inspector True examined the title in February, 1901, which was four months after the purchase by the Cattle Loan Company and the Chicago Bank of their paper, strengthen the case of the Chicago Bank. The proper time for examining the record title was before the purchase in October, 1900, when

the release would not have been found. Purchasers of cattle paper sometimes inspect the mortgaged cattle, after their purchase, but the title ordinarily is inspected before their purchase.

V.

The Chicago Bank, in its brief on the first appeal, at pages 34 and 35 thereof, confessed that the Geneseo Bank was not bound to take notice of the unauthorized release given by the Siegel-Sanders Company, and did not have constructive notice of that release nor of either of the renewal mortgages given to the Cattle Loan Company and the Chicago Bank. Since, therefore, the Geneseo Bank had no knowledge or notice of either the release given by the Siegel-Sanders Company, or of the subsequent renewal mortgages given in October, 1900, and April, 1901, to the Cattle Loan Company and Chicago Bank, it cannot be claimed that the Geneseo Bank was guilty of any negligence if it was not required, and under the Kansas chattel mortgage law had no power to take and file a formal assignment from the Siegel-Sanders Company of its note and mortgage when it purchased the same.

VI.

The brief of the Chicago Bank, on the two appeals, must be taken as practically confessing that in cases like the one at bar where there is no statute authorizing the making and recording of a formal assignment of a mortgage on the transfer of a mortgage negotiable promissory note, parties situated similarly to the Geneseo Bank in this case have the better title. The counsel of the Chicago Bank, recognizing the correctness of this proposition, seek to show that by the chattel mortgage laws

of Kansas the transferee of a negotiable promissory note secured by a chattel mortgage may take and record a formal assignment. The counsel of the Chicago Bank, although making this attempt, wholly fail to point out any section of the Kansas chattel mortgage law which provides for the making or recording of an assignment. The Kansas statutes relating to real estate mortgages, as we have already seen, are filled with provisions relating to the making and filing of assignments of real estate mortgages. The statutes of Kansas, in regard to the conveyances of real estate, contemplate the filing of record of all instruments in any wise affecting the title to real estate.

This sort of a provision is to be found in the statutes of most of the states, and in some of the states where there is no express provision for the filing and recording of assignments of real estate mortgages the Courts have held that a formal assignment of a real estate mortgage when duly acknowledged may be recorded as affecting the title to real estate, notwithstanding the absence of any specific provision for that purpose in the real estate mortgage law. And in those states the question at issue in this case has been discussed and decided upon the proposition that a purchaser of a note may file an assignment of his mortgage under the general provision of the law admitting of record all instruments affecting the title to real estate. But, while the Kansas real estate mortgage law is filled with provisions respecting the filing and acknowledgment and receiving of assignments of real estate mortgages, and while those statutes have been from time to time amended with a view of making them more perfect and complete, the Kansas legislature has industriously refrained from making any provision whatever looking to the filing or recording of assignments of chattel mortgages. The argument of counsel

of the Chicago Bank is that while the Kansas chattel mortgage law contains no provision in itself contemplating the making and recording of an assignment of a chattel mortgage, nevertheless that such assignment may be taken and filed because of the provision of the chattel mortgage law respecting the satisfaction of chattel mortgages. We do not think that the provision of the Kansas chattel mortgage law providing that chattel mortgages should be satisfied as near as may be in the mode and manner prescribed for the satisfaction of real estate mortgages was made with any regard to the question of the mode of making assignments. However, in this case the release and satisfaction were not made in the mode and manner prescribed by the real estate mortgage law of Kansas. The mode and manner of satisfying and discharging real estate mortgages in Kansas in 1900 and 1901 is clearly pointed out by Sections 4037 and 4038, page 838, of Dassler's General Statutes of Kansas for 1899.

Those sections read as follows:

> "Sec. 4037. Any mortgage of real property that has been or may hereafter be recorded may be discharged by an entry on the margin of the record thereon, signed by the mortgagee or his attorney, assignee or personal representative, acknowledging the satisfaction of the mortgage in the presence of the register of deeds or his deputy, who shall subscribe the same as a witness. A mortgage may be released by a receipt indorsed thereon, signed by the mortgagee, his agent or attorney, which receipt may be entered on the margin of the record, and shall have the same force and effect as the entry on the margin of the record, as provided in this section.
>
> "Sec. 4038. Any mortgage shall also be discharged upon the record thereof by the register of deeds whenever there shall be presented to him an instrument acknowledging the satisfaction of such

mortgage, executed by the mortgagee, his duly authorized attorney in fact, assignee, or personal representative, and duly acknowledged and certified, as other instruments affecting real estate."

Section 4037, above copied, clearly relates to a case where the mortgagee or his assignee personally appears in the office of the register of deeds and, in his presence acknowledges satisfaction of the record. Section 4038 is the section under which the release relied upon in this case was made, and that release is without any effect whatever by virtue of said Section 4038, for the reason that said release was never acknowledged, and not being acknowledged it was without effect and without any notice whatever to anybody. Neither the Cattle Loan Company or the Chicago Bank had any right to rely upon it. It results, therefore, that said release relied upon in this case by the Bank was without any effect whatever as against anybody.

The only decision in the Kansas Reports relied upon by the attorneys for the Chicago Bank to show that an assignment of a chattel mortgage may be recorded is the case of *Thomas* v. *Reynolds,* 29 Kan., 217. That was a case where the Court felt called upon to let out some man who was called upon to pay a penalty for not satisfying a mortgage. The Court was looking around to find reasons why the penalty sought to be enforced in that case should not be enforced. The case was wholly unlike the case at bar. The Court there assumed, without any argument or examination, that the chattel mortgage law contemplated assignments to be filed and recorded the same as the real estate mortgage law.

The Court there was not called upon to pass upon any such question as we have in this case; the distinct question was not there presented that we have in this case. But if that case should be construed as holding,

as contended for here, we say that it is not in harmony with three decisions of the Kansas Supreme Court, and it is not in harmony with the case of *Burhans* v. *Hutcheson,* 25 Kas., 625, where it was distinctly held by that Court that the Kansas real estate mortgage law respecting the filing of assignments of real estate mortgages have no relation or application to real estate mortgages given to secure negotiable paper. And of course if this was true as regards real estate mortgages given in Kansas to secure negotiable paper, then the same would be true of chattel mortgages given to secure negotiable paper, if we may concede for the sake of the argument that there is any statute in Kansas providing for the filing and recording of assignments of chattel mortgages in any case whatever. Said decision of *Thomas* v. *Reynolds,* if construed as contended for is also opposed to the case of *Wiscom* v. *Cubberly,* 51 Kas., 580. This last decision was given in 1893, and adjudges that:

> "Where an unsatisfied mortgage is released which was duly recorded and passed through the hands of several parties, and one of them to whom a written assignment of mortgage had been made, which was placed on record without acknowledgment, undertook to release the mortgage long after he had assigned it to another, and when the record did not formally show that he did not have authority to release the same, and subsequently another mortgage was executed by the owners upon the same real estate and accepted by the mortgagee in the belief that the first mortgage had been released. *Held,* that the subsequent mortgage was second and inferior to the first unsatisfied mortgage attempted to be released in the manner heretofore stated."

In that case Cubberly occupied the same position as the Geneseo Bank in this case, and Hutcheson the same position as the Siegel-Sanders Company, and Wiscom

occupied the same position as the Cattle Loan Company and the Chicago Bank in this case.

The Supreme Court, in its opinion in that case, used the following language:

> "If Hutcheson had had any right to execute a release, or if Wiscon or the Savings Bank had any right to rely on the release executed by Hutcheson, they might reasonably claim that their mortgage was superior to Cubberly's. When Hutcheson undertook to release the Cubberly mortgage he was not an owner of the mortgage nor an assignee with a right to release the same. Nearly four years before that time he had assigned and transferred the same to Cartwright. It is true that a mortgagee and probably an assignee who had assigned a note and mortgage may sometimes release the same so that a *bona fide* purchaser would take them free from the mortgage lien, although the note and mortgage are in the hands of the innocent purchaser and wholly unpaid, but before this can be done it must affirmatively *appear from the record that such mortgagee or assignee had authority to release.*"

In this case there is not a particle of evidence or any attempt to show that the Siegel-Sanders Company, after its transfer of the note and mortgage to the Geneseo Bank had any authority from the Geneseo Bank to satisfy its said note and mortgage. Said case of *Thomas* v. *Reynolds*, 29 Kas., 217, if construed as contended for by the counsel of the Chicago Bank, is also opposed to the decision given by the Kansas Court in the case of *Insurance Co.* v. *Huntington*, 57 Kas., 744. This case expressly approves the decision in *Burhans* v. *Hutcheson*, 25th Kas., 625, and holds that a transferee of a negotiable note is an assignee of a real estate mortgage who can satisfy the mortgage without recording a formal assignment. In that case, to which we have fully referred, it will be seen that there were several satisfactions as to different lots

covered by the mortgage made by the transferee of the note without any formal assignment of the mortgage being given, and the Kansas Supreme Court holds that those satisfactions by the transferee of the note were legal and proper. If that was true in that case, then it is also true as to the transferee of a negotiable note secured by chattel mortgage if, for the sake of the argument, it is conceded that there is in the chattel mortgage law any assignment in any case contemplated of a chattel mortgage.

We submit that those cases in the 25th, 51st and 57th Kansas Reports govern this case, and not the case relied upon by the Chicago Bank in the 29th Kansas, where the only question was one of penalty or forfeiture. The counsel of the Chicago Bank are compelled to rely alone at last on the case of *Lewis* v. *Kirk,* 28 Kas., 356. It may be freely admitted, as we do, that this case is opposed to the other three decisions of the Kansas Supreme Court in the 25th, 51st and 57th Kansas Reports. But said decisions of the Kansas Supreme Court in the two last reports are the latest judicial decisions of that Court and undoubtedly, in effect, overrule the case of *Lewis* v. *Kirk.* Besides, an examination of the decision of the Court in *Lewis* v. *Kirk* will show that Judge Valentine relied as the support of his decision in that case on the case of *Bailey* v. *Smith,* 14 Ohio. 396. Judge Valentine says, however, "the defendant justifies this doctrine above to the extent above suggested, and cited many authorities which seem to sustain his view of the case, among which is the case of *Bailey* v. *Smith,* 14 Ohio, 396, 405, seq." But this case of *Bailey* v. *Smith,* which was used as the principal reliance for the opinion in the case of *Lewis* v. *Kirk,* was expressly disapproved by this Court in the leading case of *Carpenter* v. *Longan,* 16 Wallace, 275. Said case of *Lewis* v. *Kirk* is not in harmony either

with the three other cases cited from the Kansas Supreme Court, nor is it in harmony with the said decision of this court, nor with the decision of the United States Circuit Court of Appeals in the recent case of *Swift* v. *Bank of Washington, supra.*

In each one of the Illinois cases cited by the Chicago Bank in its brief there was an ordinary trust deed made by the debtor to a third party as trustee to secure the payment of a note held by another party, and in those cases the trustee was expressly empowered not only to sell but to enter satisfaction where the note should be held by the payee or his indorsee, and in those cases the legal title was conveyed to the trustee to enable him to execute the trust.

Of course those cases are not like the case at bar. We submit that in the case at bar under the Kansas Statutes the original mortgagee of a chattel mortgage after transfer by him of the negotiable promissory notes secured by the mortgage possesses no power either to satisfy the mortgage or to recover in an action of replevin the property mortgaged or to sue in trover where the property is converted. Under the Kansas chattel mortgage laws the rights, duties and powers of the original mortgagee all pass to the transferee of the note secured by the original mortgage.

In the case of *Mann* v. *Jummell,* 183 Ill., 538, which is one of the cases cited by counsel of the Chicago Bank, the trustee who released had the legal title to the land and was empowered to release by the trust deed. It was held in that case by the Illinois Supreme Court that the assignee of the note could have procured and recorded a formal assignment of the note and trust deed. In that case the assignee allowed the indebtedness to run five years after it became due.

The case of *Lenartz* v. *Quilty,* 191 Ill., 174, which is also cited by counsel for the Chicago Bank, is the same

as said case of *Mann* v. *Jummell.* In the case of *Davy* v. *Brenton,* 102 Iowa, 482, which was also cited by the Chicago Bank, the release was given by the trustee in a trust deed who was especially empowered by the deed to satisfy or release the same. In the case at bar the Kansas chattel mortgage statutes, contemplate that where the chattel mortgage has been assigned, the satisfaction or release must be made or given by the assignee and not by the original mortgagee. Sections 4068 and 4069 of the Kansas mortgage law of 1899, clearly contemplate that after default where the chattel mortgage has been assigned, the assignee of the note and not the mortgagee is the only person who can enforce the mortgage and sell the mortgaged chattels and sue in replevin and trover.

Bohart v. *Buckingham,* 62 Kas., 658. This is the section which contained the words "mortgagee or his assignee." And those sections should be construed *"in pari materia,"* with section 4067, of the same statute, which provides for the satisfaction of Kansas chattel mortgages to be made by the "mortgagee or his assignee."

In Texas, where *Henderson* v. *Pilgrim,* which is also cited by the counsel of the Chicago Bank, was decided, it was held that an assignee of a mortgage may take and record a formal assignment. Of course it goes without saying that if there is no law for the making and recording of an assignment of a chattel mortgage it would be without effect and would not be notice to anybody, although made and recorded.

The case of *Williams* v. *Jackson,* 107 U. S., 478, and *Townsend* v. *Little,* 109 U. S., 504, which are cited in the brief of the Chicago Bank are similar to the Illinois cases also cited by the Chicago Bank, to which we have already referred. Said cases of *Williams* v. *Jackson,* and *Townsend* v. *Little,* were both cases of trust deeds in which

power was actually given to the trustee coupled with the legal title of the real estate conveyed and fully empowering the trustee to satisfy the trust deeds whether the mortgage notes are held by the original *cestui que* trust or his indorsee.

The Indiana cases cited by the [illegible] Bank in its brief were all decided since the Act of July 2nd, 1877, of that state, which expressly provided for the recording of assignments of mortgages.

The case of *Porter* v. *Ourada*, 71 N. W., 52, cited by the Chicago Bank, is not in point. That case cites the decision of the Supreme Court of Nebraska in the case of *Whipple* v. *Fowler*, 41 Neb., 675-685-686. We invite the special attention of the Court in this case to said decision of *Whipple* v. *Fowler*. In that case it was held that the fact of the subsequent mortgagee having taken and purchased his mortgage prior to the maturity of the prior mortgage, prevented the subsequent mortgagee from being an innocent purchaser because of his purchase prior to the maturity of the other mortgage. In the case at bar the Chicago Cattle Loan Company took its note and mortgage in October, 1900, which was prior to the maturity of the debt and mortgage of the Geneseo Bank which matured on November 1st, 1900. See also on this point the case of *Matthew* v. *Jones*, 47 Neb., 616-624. It may be said generally of each and all of the cases cited by counsel for the Chicago Bank that there was a law as construed by the Court authorizing and permitting the making and recording of an assignment of the mortgage at the time of the transfer of the note. As we have seen that was not permissible in this case under the chattel mortgage laws of Kansas. Therefore, it cannot be said in this case that the Geneseo Bank was guilty of any negligence whatever; it did everything it could do at the time and after it bought its note and mortgage. It never had

any knowledge, actual or constructive, of the filing of the release or of the giving or recording of the renewal mortgages given and held by the Cattle Loan Company and the Chicago Bank. The time had not arrived when this suit was brought for the filing of the affidavit during the last thirty days of the year. And the Geneseo Bank having foreclosed its mortgage by taking possession of the cattle prior to the arrival of said thirty days, it results that the Geneseo Bank had done everything that the law required it to do, or that it could possibly do to protect its right. We agree with the learned counsel of the Chicago Bank that where one of two innocent parties in a case must suffer, the loss must fall upon that one of the two parties who has made it possible for the fraud to be committed by the third party. That was done in this case by the Chicago Cattle Company trusting the Siegel-Sanders Company. The Cattle Loan Company and the Chicago Bank made it possible for the Siegel-Sanders Company to commit a fraud by accepting the second and third renewals of October, 1900, and April, 1901, without making further inquiry and accepting their attempted release as representing the note holder. Therefore, applying that maxim to this case, the loss in this case ought to fall on the Cattle Loan Company and the Chicago Bank which made the fraud possible, and not upon the Geneseo Bank, which has not omitted anything, and has not done anything to enable the Siegel-Sanders Company to defraud anybody.

VII.

We will here make some suggestions in regard to the authorities and remarks in the brief of plaintiff in error. Nearly all of the cases cited by the learned counsel for plaintiff in error were cases of real estate mortgages. As

we have seen, there is a very different policy in regard to the transfer of real estate and personal property titles.

Real estate titles and interests are ordinarily evidenced by instruments of writing recorded with the Register of Deeds—not so with personal property. The transmission of personal property titles, and interests in personal property, is not ordinarily clogged by provisions of law requiring the registering of instruments affecting them. Instruments affecting those titles are not required to be recorded, and parties may ordinarily convey without the registration or recording of instruments of writing.

We have already noticed the larger part of the cases cited by plaintiff in error. The case of *Ferguson* v. *Blatchford,* decided by the Supreme Court of Michigan, 35 N. W., 820, and cited by counsel, was a case of a real estate mortgage. That was a case, however, where the discharge of the mortgage had been made by a party authorized to make it, but the discharge had been made through mistake, and the question there was whether a discharge of a mortgage made by a party who had the power to discharge it, by mistake, could be set aside as against innocent third parties,—an entirely different question from the one we are dealing with in this case.

The case of *Morris* v. *Beecher,* 45 N. W., 696, which was decided by the Supreme Court of North Dakota and cited by counsel, is not in point. In that case the mortgage was never recorded, having been lost. That was also a mortgage on land.

Another case cited by counsel for plaintiff in error is *Jenks* v. *Shaw,* 68 N. W., 900, which was decided by the Supreme Court of Iowa. That was also a real estate mortgage. In that state there is a provision that all instruments of writing affecting, either in law or in equity, title to real estate, must in order to have effect as against subsequent purchasers, be recorded, and under that statute

as construed by the Iowa Supreme Court, it was permissible for the transferee of a real estate mortgage note to register his assignment, which was not done in that case.

The case of *Purdy* v. *Huntington*, 42 N. Y., 334, which is cited by counsel, seems to us to be more of an authority in favor of defendant in error than in favor of the plaintiff in error. In the opinion of the New York Court of Appeals in that case, delivered by Judge Lott, it is said:

> "It is to be conceded that he is to be charged "with constructive notice of the existence of the "mortgage, and of the continuance of its lien, by its "record in the proper office. By that he was in- "formed not only of the date of the mortgage, the "amount secured thereby, and all of its particulars, "but that it was open and uncancelled of record, and "therefore apparently an outstanding lien and in- "cumbrance on the premises of which he was taking "title. Having that information, he knew or at least "was chargeable at law with the further notice, "that it was such a lien and encumbrance in the "hands of any person to whom it had been legally "transferred, and that the record of such transfer "was not necessary to its validity, nor as a protection "against a purchaser of the property mortgaged "or any other person than a subsequent purchaser in "good faith of the mortgage itself or the bond or "debt secured thereby; but on the contrary that a "vendee of the premises took it subject to the lien "of the mortgage irrespective of the ownership there- "of. *That knowledge and notice made it his duty "in the exercise of proper diligence, to inquire "whether Minott Mitchell, his vendor, was still the "owner and holder of the mortgage, and his omis- "sion to make that inquiry deprives him of the pro- "tection of a bona fide purchaser.*"

The case of *VanKeuren* v. *Corkins*, 66 N. Y., 77, which is also cited by counsel, is in conflict with the decision of this Court in *Carpenter* v. *Longan*, 16 Wall.,

271, and is also in conflict with the decision of this Court in the case of *Ward* v. *Smith*, 7 Wall., 447.

The case of *Drumm-Flato Commission Co.* v. *Barnard*, 66 Kas., 568, which is also cited by counsel for plaintiff in error, is not in point. In that case the plaintiff delivered a release of a portion of the property covered by plaintiff's chattel mortgage, directly to the agent of defendant who had bought that mortgaged chattel property from the mortgagor. The defendant, Barnard, was the purchaser, and the question in that case was whether the release given by the plaintiff to the defendant, Barnard, constituted an estoppel. Of course it is evident from this statement of the case that no question of the sufficiency of the registration of the release arose for decision of the Court. There was no occasion for setting out the acknowledgment to the release in that case, if it was acknowledged, and the only point was whether the operative language of the release itself created an estoppel for more cattle than were named in the release. The point as to whether an unacknowledged release was an instrument proper to be recorded, was not made, and did not arise in the case. There was no occasion for the discussion or decision of any such question, and it was not presented by counsel or decided by the Court.

At the bottom of page 12 and the top of page 13 of the brief and argument for plaintiff in error, it is practically conceded that the statute of Kansas does not in terms require or permit the recording of an assignment of a chattel mortgage. And at page 13 of counsel's brief, an authority from Jones on Mortgages is cited. That citation is from the work on mortgages of real estate, and not mortgages of chattels. The work of Jones on Mortgages has relation, as is well known, to mortgages on real estate. Jones has a separate work on chattel mortgages.

What is said in that citation, by Jones, has relation to the policy in various states in regard to the assignment of real estate mortgages.

We have already cited in this brief, Section 663 of Jones on Chattel Mortgages, which points out very clearly and distinctly the distinction between the policy of the various states regarding the assignments of real estate mortgages and the policy regarding the assignments of chattel mortgages.

At page 42 of the brief of counsel for plaintiff in error, it is suggested that the record does not afford constructive notice in this case to the Chicago Bank of the title of the Geneseo Bank. We have endeavored, at several points in the foregoing brief and argument, to answer that point. The Chicago Bank was bound to take notice in October, 1900, when it bought its notes and mortgages, that the mortgage under which the Geneseo Bank claimed was still of record and unsatisfied. It dealt with respect to the notes and mortgage of the Siegel-Sanders Live Stock Commission Co. without making any inquiry as to whether that Company had assigned to the Geneseo Bank the notes held by that bank. Inasmuch as by a simple inquiry put by the bank to the Siegel-Sanders Live Stock Commission Company in October, 1900, it would have ascertained that the Geneseo Bank's note was held by that bank, we submit, in view of the authorities heretofore cited and considerations heretofore presented, that the Chicago Bank must be held to have purchased with notice that that note was or might be outstanding. A fact which the Chicago Bank could have ascertained by inquiry from the Siegel-Sanders Live Stock Commission Co., must be taken the same as having been known by the Chicago Bank.

At the bottom of page 46 and on page 47 of the brief and argument of counsel for plaintiff in error, an

extract is made from the testimony of one Thornton W. Sargent. If the entire testimony of Mr. Sargent had been set out instead of mere extracts therefrom, it would have appeared that he gave a very different version of the law as he understood it, from that inferred from what is cited by counsel. Thus, at page 106 of the printed record Mr. Sargent testified as follows:

> Q. You have stated, Mr. Sargent, that if such a release was signed by the mortgagee, that the mortgage would be released, regardless of who owned it or who controlled it or who was interested in it? A. Yes, sir, that would under some qualifications, of course.
>
> Q. Give us the qualifications? A. That release would be good as against the parties.
>
> Q. What parties do you mean? A. I mean it would be a good release of a mortgage as between the mortgagor and the mortgagee.
>
> Q. How about an assignee? A. Do you mean a subsequent assignee, or prior assignee?
>
> Q. I mean an assignee of a chattel mortgage; we are talking about the assignee of a chattel mortgage, the owner of the note at the time it was released, the assignee of the note? A. The assignee of a non-negotiable instrument, the release would be good as to him.
>
> Q. How about the assignee of a negotiable instrument? A. As between the mortgagee and the assignee of a negotiable instrument secured by chattel mortgage, the release would not be good, in my judgment.

The opinion given by Mr. Sargent and quoted at page 47 of the brief of counsel, that a release of a mortgage in Kansas is good when recorded as against third parties, although the release is not acknowledged, is contrary, as we have seen, to the express statutory provisions of Kansas, and is therefore without any force whatever.

At pages 51-52 of the brief of counsel for plaintiff in error, the assumption is bodly made that the Chicago Bank in this case, on the facts, is a subsequent innocent purchaser for value without notice. We have already in our brief and argument covered this point. The simple fact is that the Chicago Bank bought, with the loan company, the notes and mortgages held by the Chicago Bank in the Chicago office of the Siegel-Sanders Commission Company in October, 1900, and while the mortgage held by the Geneseo Bank was still on record and a month before the making and recording of the release.

The testimony of Mr. Swain who was in charge of the Chicago office, of the Siegel-Sanders Live Stock Commission Company (p. 45, printed Record), shows that the Chicago Bank obtained title by its purchase of its notes and mortgage from him without any reference to or examination of what was on record in Clark County, Kansas, respecting the mortgaged cattle.

Mr. Doud also testified that this transaction of the purchase in Chicago was in October or the early part of November, 1900 (p. 91, Record).

The plaintiff did not have any knowledge of the release which was recorded a month after its purchase of these notes and mortgage, until it sent out its agent, Mr. True, who found the release, and first learned of the fact of the release in February, 1901. According to the testimony of the witness, True (p. 83, Record), the fact is indisputable that the purchase of these notes and mortgage held by the Chicago Bank in October, 1900, was, prior to the discovery of the release by him in February, 1901, and this also appears explicitly from the remarks of Mr. Strawn, one of the counsel of the plaintiff in error, in his opening statement in the trial court and which is to be found at page 40 of the printed record. Those remarks of Mr. Strawn in his opening statement, are as follows:

"I might say by way of history, and it will also come out in the evidence, that the Chicago Cattle Loan Company is a corporation, organized under the laws of West Virginia, having its office and principal place of business at Chicago, and that the offices of the Chicago Cattle Loan Company are also the offices of the National Live Stock Bank of Chicago, the plaintiff; that in the month of February, 1901, the Chicago Cattle Loan Company and the plaintiff Bank,—the Cattle Loan Company at that time, owning the mortgage which we claim was a first mortgage on the cattle, sent a representative to Ashland, Kansas, to examine the records."

In this statement Mr. Strawn had reference to the witness, True, who went out in February, 1901, and found this release for the first time, four months after the parties had bought the notes and mortgages relied upon.

Again, at the bottom of page 86 and the top of page 87 of the printed record, appears the following statement of Mr. Strawn:

"By Mr. Strawn: This loan under which Mr. Young claims was made on June 27, 1900.

By the Court: Under which you claim?

By Mr. Strawn: No, under which the First National Bank of Geneseo, the defendant, claims, under a loan secured by a mortgage bearing date June 27, 1900.

By the Court: Yes, sir.

By Mr. Strawn: Which expired by its terms November 1, 1900, and which was released as per this release we have introduced in evidence, November 27, 1900. Subsequent to that and on October 17, there was a new mortgage made which the Cattle Loan Company had for $14,000, and that was the mortgage which Mr. True went there at the time to investigate, and subsequently, and on the 17th day of April, 1901, our mortgage was executed, under which we claim in this suit.

By the Court: I thought Mr. True was representing your mortgage.

By Mr. Strawn: He does, he says he represents the Cattle Loan Company and the National Live Stock Bank, both. I will prove by him that their offices were together, and that we went there in February to examine the security pledged to the Chicago Cattle Loan Company by this mortgage which bore date October 17, 1900. That mortgage came due in April, 1901, and was renewed or a new mortgage given in place of it, which is the mortgage which we claim under in this suit and the mortgage which we claim under bears date about April 17, 1901.

By the Court: Then it was a second mortgage, that is, was a renewal mortgage of a previous debt?

By Mr. Strawn: Yes, sir. Our theory in this case is that with that mortgage.

By the Court: I am not caring about the theory; I want the facts. What I first suggested was the point that Mr. True was investigating a loan already made.

By Mr. Strawn: Yes, sir."

These quotations and suggestions, with what we have already heretofore said in this brief and argument, demonstrate, as it seems to us, that the assumption and claim of the Chicago Bank being an innocent subsequent purchaser for value without notice, upon the faith of the recorded release, is without any support whatever.

In this connection, at the bottom of page 51 and top of page 52 of the brief and argument of counsel, it is said:

"If the Geneseo Bank had expended one dollar "for recording and a two-cent stamp for mailing "the mortgage to the Register at Ashland, it would "have saved the litigation covering a period of five "years, causing great loss to both litigants."

As we have already seen, the Geneseo Bank had no right or authority under the Kansas chattel mortgage laws to record an assignment of the purchase of its note and mortgage. Following the above language, the counsel said: "And still it left it in the power of that Commission Company to swindle somebody." Nothing could be more erroneous than this suggestion. The Commission Company did not represent the assignee of the note. The Chicago Bank bought its note and mortgage in Chicago in October, 1900, without any knowledge of the release which was made a month thereafter, and it cannot be said, in view of the facts of this case, that the Chicago Bank was swindled by anybody. The Geneseo Bank did not leave it in the power of the Commission Company, or anybody else, to swindle the Chicago Bank, or any other person. The Chicago Bank knew full well that the Commission Company did not represent the assignee of the note secured by the first mortgage, and as we have seen, if the Chicago Bank had made inquiry of the Commission Company it must have ascertained that the Commission Company did not have the note. If it did not have and could not produce the note, then it did not have power to satisfy the mortgage.

At page 52, counsel said:

> "It is a weak argument and contrary to the "spirit of the laws of Kansas or of any other com- "munity, which says that a secret assignment of a "note carries with it a chattel mortgage on hundreds "of cattle without a scratch of a pen, as against a "*bona fide* purchaser, without notice, who walked up "and paid out his money on the faith of a public "record whose proclamation to the world was con- "trary to the terms of the secret."

The learned counsel who made the above suggestion must have had some other case in mind, and not the case at bar. The Chicago Bank in no sense was an innocent *bona fide* purchaser, without notice, and did not, as

counsel suggests, "walk up and pay out its money on the faith of a public record." It simply bought its notes and mortgages in Chicago without any examination whatever of the records of Clark County, Kansas. It bought its notes and mortgages in the very way in which banks and trust companies buy this class of paper everywhere. The very mode in which the Chicago Bank bought the paper in question in Chicago without going to Kansas to examine the record, is, in itself, an argument against its contention in this case that the records in regard to personal property should fetter and clog still more the transfer of chattel mortgage paper.

It seems to us that the reasoning of the opinion of the Supreme Court of Oklahoma has not been answered by counsel and that that reasoning is unanswerable.

The quotation from the language of Mr. Justice Swayne, at the bottom of page 52 and top of page 53 of cousel's brief, is as follows:

> "If one of two innocent persons must suffer "by a deceit, it is more consonant to reason that he "who 'puts trust and confidence in the deceiver "should be a loser rather than a stranger.'"

This applies more distinctly to the attitude in this case of the Chicago Bank, than it does to the Geneseo Bank. The Geneseo Bank did not put any trust or confidence in the Commission Company. The Chicago Bank did put trust and confidence in the Commission Company by buying its paper from that Company without first examining the record in Kansas. The Geneseo Bank did nothing to induce the Chicago Bank to give credit to the Commission Company.

Respectfully submitted,

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1906.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, *Plaintiff in Error,*
vs.
FIRST NATIONAL BANK OF GENESEO, ILLINOIS, *Defendant in Error.*
} No. 33.

Error to the Supreme Court of the Territory of Oklahoma.

Supplemental Brief of Defendant in Error.

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Attorneys for Defendant in Error.

—IN THE—

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No. 33.

Error to the Supreme Court of the Territory of Oklahoma.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

Counsel of defendant in error in the above entitled cause beg leave to submit to the court the following additional authority in this case, in support of the contention of the defendant in error on the merits, namely, *First National Bank of Chicago* v. *Baird*, 141 Fed. Rep., 862.

Said case of *First National Bank of Chicago* v. *Baird*, will be found to be an exact precedent in support of all of the contentions of the defendant in error on the merits of this controversy. That case was decided by the United States Circuit Court of Appeals of the Eighth Circuit since the filing of briefs in this case, and in the opinion of the court in that case the opinion of the Supreme Court of Oklahoma in this action is cited, with other authorities, with approval.

Respectfully submitted,

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BUCKNER F. DEATHERAGE,
ODUS G. YOUNG,
Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 33.—October Term, 1906.

National Live Stock Bank of Chicago, Illinois, Plaintiff in Error, vs. First National Bank of Geneseo, Illinois. } In error to the Supreme Court of the Territory of Oklahoma.

[December 3, 1906.]

This is an action of replevin, brought by the plaintiff in error against the defendant in error, in the District Court of Woodward County in the then Territory of Oklahoma, to recover possession of certain cattle, once belonging to one W. B. Grimes and by him mortgaged. The trial resulted in a judgment for the defendant, which was affirmed by the Supreme Court of the Territory, and the plaintiff has brought the case here by writ of error.

The action has been twice tried. The first trial ended in a judgment for the plaintiff. Upon appeal to the Supreme Court of the Territory it was reversed and the case remanded, and a second trial had, resulting in the judgment for defendant now under review. Upon the second appeal to the Supreme Court of the Territory a brief opinion was given, in which it was stated that upon appeal from the first judgment the court had "promulgated an opinion, in which it made a full statement and findings of facts and enunciated the law as applied thereto, reversed the judgment of the lower court, and remanded the case, directing a new trial." (76 Pac. Rep. 130.) The court also stated in its opinion on the second appeal that it had been agreed upon between the parties in the trial court that a jury should be waived and the case submitted on the record as made on the first trial, and that "no new question is raised on this appeal. The record is the same as stated in our former opinion, and we are fully satisfied with the law as therein declared. The judgment of the lower court is hereby affirmed at the cost of appellant."

The following facts were found by the Supreme Court on the first appeal, and were adopted by it as the facts for review on the second appeal:

One W. B. Grimes, who at the time was a resident of Clark County, in Kansas, executed at that place, on the 27th day of June, 1900, and delivered to Siegel-Sanders Live Stock Commission Company his negotiable promissory note for $11,111.23, due November 1, 1900, with interest from

maturity at the rate of eight per cent per annum. To secure the payment of this note he executed and delivered a chattel mortgage to the payee of the note on five hundred and twenty-six cattle then in the county, and the mortgage was duly filed in the office of the register of deeds of Clark County on July 12, 1900. The note was then indorsed and delivered by the payee to the Geneseo Bank, the defendant in error. It does not appear that there was any separate assignment of the mortgage. No record of any assignment was ever made in the register's office of Clark County, Kansas. On the 24th day of November, 1900, although the Siegel-Sanders Company had already sold and delivered the note for $11,111.23 to the Geneseo Bank, the defendant in error, yet notwithstanding such sale the president of that company, Frank Siegel, without any authority, filed in the office of the register of deeds a pretended release of the mortgage, in which payment of the above debt was acknowledged.

On the 25th day of February, 1901, the Chicago Cattle Loan Company caused its agent to examine the records of Clark County as to chattel mortgages against Grimes, and upon this examination he found the record clear, except as to a mortgage executed by Grimes to the Siegel-Sanders Live Stock Company, October 24, 1900, and by it assigned to the Chicago Cattle Loan Company, and True so reported to the last-named company.

On April 17, 1901, Grimes executed two other notes to the Siegel-Sanders Company for $7,694.70 each, due October 27, 1901. These notes were probably renewals of notes previously given. To secure the payment of these two notes Grimes at the same time executed and delivered a chattel mortgage to the Siegel-Sanders Company on the cattle in question and other cattle. The two notes thus given were then sold by that company to the plaintiff in error for the amount named in the notes, and the plaintiff believed at the time it bought these notes that the mortgage securing them was the first lien on the cattle, and it secured this information through its agent, who personally examined the record.

It is further stated in the finding that there was practically no dispute as to the facts, and that the trial court expressly found that both parties to this action acted in good faith.

The release of the first mortgage, signed by the president of the Live Stock Commission Company and filed in the office of the register of deeds, as above stated, on November 24, 1900, was not acknowledged.

After the execution of these various instruments, and between the 25th of April and the 1st of May, 1901, without the knowledge or consent of either of the banks, parties to this suit, Grimes, the original owner of the cattle, moved them from the State of Kansas to the county of Woodward, in the Territory of Oklahoma, at which latter place, between the 19th and 20th of May, 1901, they were seized and taken possession of by the

Geneseo Bank, the defendant. The plaintiff, within one year from the filing of the first mortgage, dated June 27, 1900, in the office of the register of deeds of Clark County, Kansas, commenced this suit in replevin in the District Court of Woodward County, Oklahoma, to recover possession of the cattle, claiming under the mortgage which was executed and delivered to the Siegel-Sanders Company on April 17, 1901, and by it sold to plaintiff; while the defendant claimed under the mortgage dated June 27, 1900, a pretended release of which had been filed as already stated, but after the assignment to defendant.

Upon these facts, as found by the Supreme Court of Oklahoma, judgment was rendered for the defendant in error.

Mr. Justice PECKHAM after making the foregoing statement, delivered the opinion of the Court.

The defendant in error, at the outset, objects to the jurisdiction of this court on the ground that the plaintiff should have brought the case here by appeal instead of by writ of error, because the case was tried without a jury, and therefore the writ of error was improper. There is nothing in this objection, as in actions at law coming from the Territory of Oklahoma it has been held that the proper way to review the judgments of the Supreme Court of that Territory was by writ of error. (*Comstock* v. *Eagleton*, 196 U. S. 99; *Oklahoma City* v. *McMaster*, 196 U. S. 529; *Guss* v. *Nelson*, 200 U. S. 298.)

Further objection is made that the court below found no facts upon which a review can be had in this court. The foregoing statement disposes of this objection also, and shows it to be untenable.

On the merits, the question arises which of these two parties shall sustain the loss occasioned by the improper act of the president of the Live Stock Commission Company in signing this pretended release, and acknowledging the payment of the eleven thousand dollar note, as above stated? The plaintiff in error contends that the defendant bank should bear the loss because of its failure to record or file the assignment to it of the first mortgage, securing the eleven thousand dollar note. The defendant opposes this view and insists that, being the holder and the owner of the eleven thousand dollar note, secured by a first mortgage duly executed on the 27th of June, 1900, and duly filed in the register's office, it has the prior right to the cattle and that the statutes of Kansas do not require that it should file or record the assignment to it of the note and mortgage, and its claim should not therefore be postponed.

The note executed by Grimes for eleven thousand and some odd dollars was negotiable, and the chattel mortgage was given at that time to secure the payment of the note. The indorsement of the note and its delivery before maturity to the defendant by the payee of the note transferred its

ownership to the defendant bank. This transfer also transferred, by operation of law, the ownership of the mortgage which was collateral to the note. Such a mortgage has no separate existence, and when the note is paid the mortgage expires, as it cannot survive the debt which the note represents. (*Carpenter* v. *Longam*, 16 Wall. 271; *Burhans* v. *Hutcheson*, 25 Kans. 625; *The Mutual Benefit Life Insurance Company* v. *Huntington*, 57 Kans. 744; *Swift* v. *Bank of Washington*, 114 Fed. Rep. 643.)

The mortgage, therefore, is a prior lien upon the cattle, as security for the payment of the note, unless defendant has lost it by its failure to record an assignment of the mortgage. Whether it has or not is to be determined by the law of Kansas.

There is no express provision in the statutes of Kansas for the filing or recording of assignments of chattel mortgages. Paragraph 36, section 4251, General Statutes of Kansas for 1901, by Dassler, may be found in the margin.* It is said this statute by implication provides for the recording of an assignment of a chattel mortgage.

Assuming that the statute makes provision for such recording, it is then argued that it is the duty of the assignee to do so, and his failure takes away a right of priority of lien which he might otherwise have. This reasoning is not satisfactory. We can not make the assumption that the statute cited does make provision for the recording of the assignment, and we fail, therefore, to find its necessity. That necessity depends upon statute, and without some statutory provision therefor the necessity does not exist. Uncertain and doubtful implications arising from portions of a statute not requiring the recording of an instrument are not to be regarded as furnishing a rule upon the subject. There are statutory provisions for recording assignments of real estate mortgages to be found in the Kansas statutes. See paragraph 19, section 4234, and paragraph 26, section 4241, General Statutes of Kansas for 1901, by Dassler. Paragraph 19, above, provides for the acknowledgment of assignments of real estate mortgages by the assignor, and paragraph 26 provides that on presentation of such assignment for record it shall be entered upon the margin of the record

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*Paragraph 26, Section 4251, General Statutes of Kansas for 1901, by Dassler, provides as follows:

"When any mortgage or personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, his assigns or personal representative, to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be, and under the same penalty for a neglect or refusal, as provided in case of a satisfaction of mortgages of real estate. The entry of satisfaction shall be made in the book in which the mortgage is entered, as hereinbefore provided; and any instrument acknowledging satisfaction shall not be recorded at length, but shall be referred to under the head of 'Remarks,' and filed with the mortgage or copy thereof, and preserved therewith in the office of the register."

of the mortgage by the register of deeds, who is to attest the same, as therein provided. Now, in relation to chattel mortgages and the assignment thereof, there is no such provision or anything similar to it. Provision is made for the satisfaction of a chattel mortgage when paid by the mortgagee, assignee, etc., but that does not make it necessary to record or file the assignment of a chattel mortgage in order to protect the assignee.

The Supreme Court of Kansas has held that there is no statute making it necessary to record an assignment of a chattel mortgage, in order to protect the rights of such assignee, and that it need not be recorded or filed. (*Burhans* v. *Hutcheson*, 25 Kans. 625; *Wiscomb* v. *Cubberly*, 51 Kans. 580; *Mutual Benefit Life Insurance Company* v. *Huntington*, 57 Kans. 744.) It is true that these cases refer to real estate mortgages, but the reasoning sustains the statement as to chattel mortgages.

The first of the above cases (*Burhans* v. *Hutcheson*) holds that where a mortgage upon real estate is given to secure payment of a negotiable note, and before its maturity the note and mortgage are transferred by indorsement of the note to a *bona fide* holder, the assignment, if there be a written one, need not be recorded. This is held even where there was an express statute as to the record of such an assignment. The statute was held not to apply to the case of a mortgage given as collateral to a negotiable note.

The second case (*Wiscomb* v. *Cubberly*) has reference also to a mortgage on real estate, and involves much the same principle.

In the third case, (*Mutual Life Insurance Benefit Co.* v. *Huntington*,) it was again held that after the assignment and delivery by the payee of a negotiable promissory note, before maturity, together with the mortgage on real estate given as collateral security for its payment, the original mortgagee had no power to release or discharge the lien of the mortgage, and a release made by him without authority, even though the assignment was not recorded, would not affect the rights of the assignee.

These cases would seem to establish the rule in Kansas that it is not necessary to record the assignment of a mortgage even up n real estate, when given to secure payment of negotiable notes, although there is a statute which in general terms provides for the recording of assignments of real estate mortgages. Still stronger, if possible, is the case of a chattel mortgage given to secure the payment of negotiable notes, when there is no statutory provision for the recording of the assignment of such mortgage. It is probable that in the large majority of cases the only evidence of an assignment of a negotiable note and a chattel mortgage given to secure its payment is the indorsement of the note and delivery thereof to the purchaser. In such a case there would be no assignment to record, and there is no provision in the statute for filing a copy of the note with its indorse-

ment, together with a statement that it had been delivered to a third party, as the purchaser or assignee thereof.

The policy of the State of Kansas seems to be not alone to give to a negotiable promissory note all the qualities that pertain to commercial paper, but also to clothe mortgages given as collateral security for the payment of such notes, with the same facility of transfer as the note itself, to which it is only an incident.

The plaintiff, however, contends for the opposite doctrine, and cites, among others, *Lewis* v. *Kirk*, (28 Kans. 497,) as its authority. In that case the question was which should suffer, a *bona fide* purchaser of the real estate which had been mortgaged or the *bona fide* purchaser of the mortgage who had failed to have his assignment recorded. The court held in favor of the purchaser of the real estate, and distinguished *Burhans* v. *Hutcheson*, *supra*, though not assuming to overrule it. The mortgage in the Lewis case was upon real estate, and would not, therefore, necessarily affect the case of a chattel mortgage, where there is no statute for recording an assignment of the mortgage.

But in *Insurance Company* v. *Huntington*, (57 Kans. *supra*,) the case of *Burhans* v. *Hutcheson*, (25 Kans. *supra*,) was cited, and the doctrine that a *bona fide* holder of negotiable paper, transferred by him by indorsement thereon before maturity, and secured by a real estate mortgage, need not record the assignment of mortgage, was again approved.

In *Smith* v. *Reynolds*, (29 Kans. 304,) cited by plaintiff, it was held that an action to recover the penalty provided for by the statute for refusal to enter satisfaction of a chattel mortgage when it had been paid, could not be sustained against the assignee of the mortgage without proof of the assignment of record, as the purpose of the statute was to clear the record, and therefore the defaulting party must have record title or his satisfaction would apparently be an impertinent interference by a stranger. That action did not raise the question herein presented, and the court made no reference to the case of *Burhans* v. *Hutcheson*, *supra*. It is quite clear that it did not intend to overrule that case. In any event, as already mentioned, the Burhans case has been approved in 57 Kans. 744, above cited. We can not treat the rule which we have stated above as having been at all shaken by the two cases from 28 and 29 Kansas (*supra*.)

The counsel for plaintiff contends that, assuming there was no statute providing for the recording of an assignment of a chattel mortgage in the State of Kansas, yet there was no law of that State which prohibited the Geneseo Bank from recording its assignment. It is not necessary that there should be a law to prohibit the recording of such assignments. There must be a law which provides for their record, either in express terms or by plain and necessary implication from the words stated. Where the statute does not so provide, it is not necessary nor is it the duty of the

assignee to record or file his assignment. There must be some legal duty imposed upon the assignee before the necessity arises for the recording of the assignment.

Counsel have cited many cases from States other than Kansas, in which the rights of assignees of mortgagees as against subsequent mortgages or conveyances have been discussed and decided. In many cases the question has arisen in regard to the recording of assignments of mortgages upon real estate, where the States had provided for the recording of such assignments, and where, in the absence of such recording, the assignee has failed in obtaining priority of rights under his mortgage, which he would have had if the assignment had been recorded. But, as the owner of the cattle mentioned herein, resided in Kansas at the time the mortgages were given, and the cattle were then in that State, and the mortgages were filed there, the transactions are to be judged of with reference to the law of that State, and we decide this question with reference to such law. Under that law the assignee of the first mortgage of June, 1900, has a superior lien to the assignee of the second mortgage of April, 1901, although such assignee of the first mortgage did not have his assignment recorded.

Judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.